92-1818

No.

Supreme Court, U.S.
FILED
MAR 29 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

FRANCES NICHOLS and DAVID NICHOLS

Petitioners,

VERSUS

GRAYDEN TUBB, M.D., TOM McDONALD, M.D. and NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE MISSISSIPPI SUPREME COURT

JIM WAIDE
(Counsel of Record)
WAIDE LAW OFFICE
ATTORNEYS AT LAW
P. O. BOX 1357
TUPELO, MS 38802
601/842-7324

WILLIAM S. LAWSON
ATTORNEY AT LAW
POST OFFICE BOX 848
TUPELO, MS 38802
601/842-8711

Attorneys for Petitioners

QUESTIONS PRESENTED

Whether the free speech clause of the United States Constitution Amendment One or the fair trial requirements of the United States Constitution Amendment Fourteen require an attorney to be permitted to conduct interviews with jurors, post-verdict, when he receives information indicating to him that there has been extraneous influence on the jury.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT TO DECIDE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER THE UNITED STATES CONSTITUTION AMENDMENTS ONE AND FOURTEEN REQUIRE A TRIAL JUDGE TO PERMIT AN ATTORNEY TO INTERVIEW JURORS, AFTER THE ATTORNEY HAS CAUSE TO BELIEVE THAT THE JURY HAS BEEN SUBJECTED TO OUTSIDE INFLUENCE 4

APPENDIX 8

TABLE OF AUTHORITIES

CASES **PAGE**

American Party of Texas v. White, 415 U. S. 505, 27 L. Ed. 2d 571, 91 S. Ct. 490 (1971) 7

Armstrong v. Manzo, 380 U. S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965) 6

Groppi v. Wisconsin, 400 U. S. 505, 27 L. Ed. 2d 571, 91 S. Ct. 490 (1971) 7

Haeberle v. Texas International, 739 F. 2d 1019 (5th Cir. 1984) 5

Irving V. Bullock, 549 P. 2d 1184 (Alaska, 1976) 5

Olberg v. Minneapolis Gas Co., 291 Minn 334, 191 N.W. 2d 418 (1971) 5

Sixberry v. Buster, 88 FRD 561 (E.D. Penn. 1980 5

Smith V. Phillips, 455 U. S. 209, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982) 6, 7

United States v. Driscoll, 276 F. Supp. 333 (S.D. NY 1967) 5

United States v. Narcisco, 446 F. Supp. 252 (E.D. Michigan 1976) 5

United States v. Sanchez, 380 F. Supp. 1260, aff'd 508 F. 2d 388 (5th Cir. 1973) 6

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment Fourteen ..... passim
United States Constitution Amendment One ..... passim

In The

Supreme Court of the United States

October Term, 1993

FRANCES NICHOLS and DAVID NICHOLS

Petitioners,

VERSUS

GRAYDEN TUBB, M.D., TOM McDONALD, M.D. and NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE MISSISSIPPI SUPREME COURT

OPINION BELOW

The Mississippi Supreme Court did not enter any written opinion on the issue presented by this Petition. The unpublished opinion of the Lee County Circuit Court is included as an appendix.

JURISDICTION

The United States Supreme Court has jurisdiction to review by Writ of Certiorari, under 28 USC Sec. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provisions involved are United States Constitution Amendment Fourteen, which requires that "due process of law" be afforded before one's life, liberty or property be taken, and United States Constitution Amendment One, which guarantees one the right to "freedom of speech".

STATEMENT OF THE CASE

The issue which Petitioners request that this Court decide is whether the United States Constitution Amendments One or Fourteen guarantee the right of a civil litigant to conduct post-trial interviews with jurors after the litigant has received information indicating that the jury may have been subject to outside influence.

The question arises from a medical malpractice case prosecuted by the Petitioners in the Circuit Court of Lee County, Mississippi.

On January 31, 1988, a jury in Lee County, Mississippi absolved the Respondent medical doctors and hospital from Petitioners' charges that they had rendered her a quadriplegic through improper application of cervical traction. During the trial, a juror (John Hankins) was seen talking with supervisory nurse employees of the Respondent hospital and was expelled from the jury, though he was allowed to sit with the jury for two days after this improper conduct. T., 1382-1386. At no time during the trial was there any evidence adduced that the juror (Hankins) either received any improper communications from hospital employees or that he had communicated this information to his fellow jurors. However, after the trial, Dr. William Gary, a local medical doctor who had testified as an expert witness for the Petitioners at trial, told Petitioners' attorney that an alternative juror (Denna) had related to him (Gary) information indicating that the jury had received adverse information about Plaintiff from outside sources. Specifically, Dr. Gary told the Petitioners' attorney (Lawson) that the juror had related to him (Gary) that the Petitioner was receiving "$7,000 from workers' compensation" per month for life.[1] Exhibit 2 to Petition for Rehearing. This information could only come from the Defendant, since the only $7,000 per month involved was an offer of settlement made by the Defendant in the amount of $7,000 per month.

Additionally, Petitioner's counsel obtained the affidavit of Juror Clifford Hill, which stated:

---

[1] There was no evidence during the trial that the Plaintiff ever received any amount of money from insurance or otherwise.

> "During the second week of the trial, one of the jurors, who was a white man who sat on the second row on the outside, started talking about how much money Ms. Nichols was already being paid..."

Exhibit 9 to Petition for Extraordinary Relief

This information must have come from an extraneous source, since there was no evidence at trial that Plaintiff was paid any amount of money.

Supported by the affidavits of Gary and the juror, Petitioners' attorney, on April 27, 1988, moved the Court for authority to interview other jurors and for an evidentiary hearing. R., 614-616. On June 7, 1988, the trial judge denied the motions to interview the jurors and for a hearing. R., 626-627.

Petitioners, utilizing Mississippi Supreme Court Rule 21, then filed a "Petition for Extraordinary Relief", complaining about the failure of the trial judge to permit further interviews of jurors and failure to conduct a hearing, so as to demonstrate that extraneous matters had influenced the jury verdict.[2]

On August 19, 1992, the Mississippi Supreme Court rendered its opinion on the appeal. This opinion does not deal with the issue presented in the Petition for Extraordinary Relief (the right to conduct juror interviews post-verdict). The opinion, reported at 609 So. 2d 377, affirmed the judgment of the Lee County Circuit Court.

On September 9, 1992, the Petitioners filed a "Petition for Rehearing", which addressed both the Court's affirmance of the judgment of August 19, 1992 and the Petition for Extraordinary Relief, dealing with the jury issue. Various supplementations of the Petition for Rehearing were filed with the Mississippi Supreme Court, includ-

---

[2] Inadvertently, Petitioners' counsel failed to file a proper caption for this pleading, and had led the pleading off with a "Statement of Facts". However, the Mississippi Supreme Court treated it as a Petition for Extraordinary Relief.

ing supplementations specifically bringing to the Mississippi Supreme Court's attention, the violations of the First and Fourteenth Amendment in failing to permit the attorney to interview jurors.

Respondents filed various pleadings with the Mississippi Supreme Court, arguing the Petition for Rehearing and its various supplements were untimely or otherwise procedurally incorrect.

On December 31, 1992, the Mississippi Supreme Court granted Petitioners' request for leave to file the various supplementations to the Petition for Rehearing. However, on the same date (December 31, 1992), the Supreme Court by an evenly divided four-four vote, denied the Petition for Rehearing. Again, there was no opinion from the Mississippi Supreme Court on the issue of the right to interview jurors post-verdict.[3]

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT TO DECIDE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER THE UNITED STATES CONSTITUTION AMENDMENTS ONE AND FOURTEEN REQUIRE A TRIAL JUDGE TO PERMIT AN ATTORNEY TO INTERVIEW JURORS, AFTER THE ATTORNEY HAS CAUSE TO BELIEVE THAT THE JURY HAS BEEN SUBJECTED TO OUTSIDE INFLUENCE.

Whether an attorney may communicate with jurors following the jury's verdict has been the subject of disagreement among the state and federal courts. Some courts have approved the practice of lawyers

---

[3] The Mississippi Supreme Court was evenly divided, since one Justice did not sit. The failure of the Justice to sit was made "pursuant to internal operating rules". These rules are not a public record, and there is no reason, of record, for the failure of one Justice to sit on the Petition for Rehearing.

talking with jurors after a verdict, even for the mere purpose of self-education. See, for example *United States v. Narcisco*, 446 F. Supp. 252 (E.D. Michigan 1976); *Irving v. Bullock*, 549 P. 2 d 1184 (Alaska 1976).

On the other hand, other courts hold that communicating with the jury for the mere purpose of self-education, post-verdict, is improper and sanctionable. See, for example, *Sixberry v. Buster*, 88 FRD 561 (E.D. Penn. 1980); *United States v. Driscoll*, 276 F. Supp. 333 (S. D. NY 1967). Of course, when a Plaintiff's attorney seeks to interview the jurors not merely to satisfy his curiosity as to the grounds for verdict, but because the attorney believes that extraneous influence may have been exerted on the jury, a stronger case for allowing the communication with the jurors is made. Thus, *United States v. Sanchez*, 380 F. Supp. 1260, aff'd 508 F. 2d 388 (5th Cir. 1973), held jurors should be permitted to be interviewed where there has been shown good cause for believing that there was extraneous influence.

United States v. Narcisco, 446 F. Supp. 2d 252 (E.D. Michigan 1976), found the law "ambiguous" with regard to whether post-trial contact with jurors was permitted and questioned the advisability of a holding that any "cause" would be required. *Narcisco* noted that, absent contact with the jurors, the attorney would have no reason to know whether any outside information had gone to the jury.

On the other hand *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 191 N. W. 2 d 418 (1971), set forth a broad rule that an attorney should *never* interrogate a juror or telephone him for the purpose of gathering evidence of jury misconduct. But the Minnesota Supreme Court was of the view that the trial court should be "liberal" in granting hearings so that extraneous influence could be explored in open court.

Haeberle v. Texas International, 739 F. 2 d 1019 (5th Cir. 1984), noted rules against post-trial juror contact raised First Amendment issues, but held the state's interest in protecting the privacy rights of jurors outweighed the free speech rights of a litigant seeking to interview jurors.

It is, thus, readily seen that there is a diversity of opinion among the lower courts on the issue of propriety of attorney contact with jurors post-verdict. The Fifth Circuit has decisively held it not unconstitutional to prohibit such ex parte contact where there is no prior showing of "cause" to suspect juror misconduct. However, the competing interest surely must be viewed differently where it is demonstrated that an attorney does have "cause" for suspecting that the jury has received improper influence. In this case, the Petitioner's attorney had such "cause" since he had information from a third party (Dr. Gary), as well as from two jurors, that the jury was aware of substantial workers' compensation payments being paid to Petitioner. In this context, the interest of the litigant in securing a fair trial for a catastrophic injury surely outweighs whatever speculative "privacy" interest a juror might have in failing to discuss whatever extraneous influences might have occurred.

The various inconsistency among the lower courts in deciding the issue here presented, however, is not the only reason for granting the Writ to decide the question of an attorney's right to question jurors, post-trial, after learning of possible prejudicial information given to them, A ruling prohibiting such juror contact, once an attorney suspects "extraneous influence", is also inconsistent with this Court's decisions. *Smith v. Phillips*, 455 U. S. 209, 71 L. Ed. 2 d 78, 102 S. Ct. 940 (1982), held that once possible jury bias is shown, the due process clause of the United States Constitution Amendment Fourteen requires a "hearing" before a new trial can be denied. Of course, a "hearing' could not be "meaningful" one required by due process, *Armstrong v. Manzo*, 380 U. S. 545, 14 L. Ed. 2 d 62, 85 S. Ct. 1187 (1965), if one cannot interview the potential witnesses to determine if extraneous influence exists. Counsel would hardly know what witnesses to call at the hearing if he could not first interview the jurors to determine whether some person did convey extraneous information to them, The requirement of a "hearing", as was held to exist in *Smith v. Phillips*, *supra*, necessarily implies the right to obtain potential witnesses to appear for the hearing. The requirement of a post-trial hearing necessarily implies the right to interview jurors to determine if there are such witnesses. By holding the Plaintiff's attorney first had to prove to the judge that there had been extraneous influence before jurors

could be interviewed, the trial judge makes the *Smith v. Phillips* requirement to a hearing meaningless. If the attorney cannot interview jurors to determine if there has been an extraneous influence, what is there to hold a hearing about?

General principals of law, announced under the "free speech" clause, are also violated by the prohibitions against interviewing jurors post-verdict.

While this Court has apparently not heretofore evaluated the restrictions on the right of counsel to talk to jurors post-verdict, this type of "speech" is well within the framework of that type speech this Court has held routinely protected. See, for example, *American Party of Texas v. White*, 415 U. S. 767, 39 L. Ed. 2d 744, 94 S. Ct. 1296 (1974) (Only a "compelling state interest" may justify any regulation or rules which limits freedom of speech.) Here, it is plain that the Constitution requires an "impartial jury". *Groppi v. Wisconsin*, 400 U. S. 505, 27 L. Ed. 2d 571, 91 S. Ct. 490 (1971). In order to assure that there was such an impartial jury, it is crucial that counsel be allowed to investigate his information that outside influences came to bear on the jury. The only state interest in prohibiting this communication is that of keeping the jury from being "harassed" or in keeping their deliberative process secret. This interest can readily be met simply by providing that counsel's questioning of the jury would be limited to matters of whether there was any extraneous matter brought to their attention.

Thus, when properly balanced, there is no legitimate interest in prohibiting the attorney from talking with the jurors post-verdict, and this Court should grant the Writ in order to decisively hold that prohibiting contact with jurors, once counsel has "cause" to believe that there has been extraneous influence upon the jury, violates the First Amendment.

Respectfully submitted,

JIM WAIDE
(Counsel of Record)
WAIDE LAW OFFICE
ATTORNEYS AT LAW
P. O. BOX 1357
TUPELO, MS 38802
601/842-7324

WILLIAM S. LAWSON
ATTORNEY AT LAW
POST OFFICE BOX 848
TUPELO, MS 38802
601/842-8711

Attorneys for Petitioners

No.

In The

Supreme Court of the United States

October Term, 1993

FRANCES NICHOLS and DAVID NICHOLS

Petitioners,

VERSUS

GRAYDEN TUBB, M.D., TOM McDONALD, M.D. and NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

APPENDIX

JIM WAIDE
(Counsel of Record)
WAIDE LAW OFFICE
ATTORNEYS AT LAW
P. O. BOX 1357
TUPELO, MS 38802
601/842-7324

WILLIAM S. LAWSON
ATTORNEY AT LAW
POST OFFICE BOX 848
TUPELO, MS 38802
601/842-8711

Attorneys for Petitioners

IN THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI.

FRANCES NICHOLS
and DAVID NICHOLS — Plaintiffs

No. 19,993

VERSUS

GRAYDEN TUBB, M.D.,
LESTER C. WILLIS, M.D.,
THOMAS McDONALD, M.D., AND
NORTH MISSISSIPPI MEDICAL CENTER

Defendants

ORDER

This cause came on to be heard on the Ex Parte Motion To The Court To Interview Jurors filed by counsel for the plaintiffs on April 27, 1988, and the Court having heard the motion presented with preliminary authorities cited by counsel on May 16, 1988, and the Court having further received the taped conversations of plaintiff's counsel with jurors Denham and Stasko from said counsel and a transcript of the same obtained and attached as Exhibit A to this Order, FINDS and ADJUDICATES as follows, to-wit:

1. Section 606 (b) Mississippi Rules of Evidence prohibits inquiry into the mental processes of a juror but permits a juror to testify "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror",

2. That the burden is upon the moving party to show good cause to interview jurors with a reasonable expectancy of proving that extraneous prejudicial information was improperly brought to the jury's attention during the course of its deliberations and plaintiff's showing on this motion does not make a *prima facie* case under the rules of the Court. *Pan American Petroleum Corp. v. Pate*, 157 Miss 822, 128 So. 870 (1930) overruled on other grounds. See also *City of Meridian v. Bryant*, 232, Miss, 892, 100 So. 2d 860 (1959) and *Index Drilling Co. v. Williams*, 242 Miss. 775, 137 So. 2d 525 (1962).

3. That the transcripts of the telephone conversations between counsel for the plaintiff and juror Stasko and alternate juror Denham affirmatively reflect that neither those jurors, nor any of the other jurors who were involved in deliberations, received extraneous prejudicial information improperly brought to the jury's attention and reflect that no outside influence was improperly brought to bear upon any juror during the course of the deliberations.
It is therefore

ORDERED that plaintiff's Ex Parte Motion To The Court To Interview Jurors be and it is hereby overruled and denied.

SO ORDERED this the 7th day of June, 1988

CIRCUIT JUDGE

IN THE SUPPREME COURT OF MISSISSIPPI
DECISION HANDED DOWN
ON THE 31ST DAY OF DECEMBER. 1992

89-CA- 0590 Frances Nichols and David Nichols v. Grayden Tubb, M. D. ,Tom McDonald, M. D., and North Mississippi Medical Center; Appeal No. 19993 from Judgment dated February 8, 1988, Lee County Circuit Court; DISPOSITION - Petition for Rehearing Denied. Dan Lee, P. J., Sullivan, Pittman and McRae, J. J., would grant. Roberts, J., Not Participating according to Supreme Court Internal Rules. DISPOSITION-Motion for leave to supplement petition for Rehearing Upon Newly Discovered Information Granted. Order Entered. DISPOSITION - Motion for Leave to Further Supplement Petition for Rehearing Upon Newly Discovered Information Granted. Order Entered. DISPOSITION - Motion to Strike Petition for Rehearing and Supplementations Thereto Denied. Order Entered. DISPOSITION - Motion for Leave of Court to Supplement Record on Appeal Granted. Order Entered.

(5)

Supreme Court, U.S.
FILED
MAR 29 1993
OFFICE OF THE CLERK

92-1818

No.

In The

Supreme Court of the United States

October Term, 1993

FRANCES NICHOLS and DAVID NICHOLS

Petitioners,

VERSUS

GRAYDEN TUBB, M.D., TOM McDONALD, M.D. and NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

SUPPLEMENTAL APPENDIX

JIM WAIDE
(Counsel of Record)
WAIDE LAW OFFICE
ATTORNEYS AT LAW
P. O. BOX 1357
TUPELO, MS 38802
601/842-7324

WILLIAM S. LAWSON
ATTORNEY AT LAW
POST OFFICE BOX 848
TUPELO, MS 38802
601/842-8711

Attorneys for Petitioners

In The

Supreme Court of Mississippi

No. 89-CA-0590

FRANCES NICHOLS AND DAVID NICHOLS

V.

GRAYDEN TUBB, M. D. TOM McDONALD, M. D., AND NORTH MISSISSIPPI MEDICAL CENTER

EN BANC.

HAWKINS, PRESIDING JUSTICE, FOR THE COURT:

Frances and David Nichols appeal from a jury verdict and judgment in the circuit court of Lee County in favor of Grayden Tubb, M. D., Tom McDonald, M. D., and North Mississippi Medical Center in a malpractice suit. On appeal the Nichols contend there was a discovery violation and erroneous refusal of instructions requested by plaintiffs. We find no error and affirm.

FACTS

On Friday, April 13, 1984, Mrs. Nichols, as a patient, went to Dr. Tubb's office in Fulton, complaining of pain in the left side of her neck. She told him she had not been injured. She had no fever. He did an ear, nose and throat examination, and checked her reflexes. He concluded she had a crick, administered an injection of prednisolone and lidocaine, and prescribed 40 soma compound, a combination muscle relaxant and aspirin. He then told her to return if she did not get to feeling better.

Mrs. Nichols returned Tuesday, April 17, this time complaining of pain in the right side of her neck. She had no fever. He diagnosed her as having an acute fibrositis of the sternocleidomastoid muscle. He gave her another injection, and told her to return if she did not get all right.

She returned Monday, April 30, this time complaining of her right knee, which was swollen. She had no fever, and again told him that she was still having trouble with her neck. Dr. Tubb noticed that her knee was puffy, and Mrs. Nichols told him she had experienced congestive heart failure with the birth of her last child eleven or twelve years earlier and had to take digitalis for two years, and was advised not to have any more children. Dr. Tubb silently concluded this was probably her problem, but in order not to alarm her, said nothing. He termed her problem "idiopathic edema" and treated her with lasix, a first medication in congestive heart failure. He also prescribed meclomen, a non-steriodal anti-inflammatory drug.

Mrs. Nichols returned Wednesday, May 2, complaining of her swollen right knee, and of being nervous. She told him she was tense, anxious, and wanted something for her nerves.

She returned on Saturday, May 12, feeling "extremely bad." She continued to have pain in her neck and knee. He diagnosed her ailments as congestive heart failure and arthritis, and hospitalized her, telling her that if her condition did not improve, he would have to send her to the North Mississippi Medical Center (Medical Center) in Tupelo. X-rays and blood tests showed Mrs. Nichols had a completely obliterated disc space between the C-5/C-6 vertebra, and an elevated white blood count. Dr. Tubb's diagnosis was ruptured disc. While hospitalized in Fulton, Mrs. Nichols used a walker.

Mrs. Nichols' condition did not improve, and on Monday morning, May 21, Dr. Tubb telephoned Dr. McDonald, a neurosurgeon, and she was transferred to North Mississippi Medical Center, where Dr. McDonald first saw Mrs. Nichols in the emergency room, and examined x-rays taken in Fulton on May 13.[1] He noticed a subluxation at the C-5/C-6 level, a slipping of C-5 vertebrate back on C-6 approximately four millimeters, "a little spur" and osteoarthritis, and that the disc space at the C-5/C-6 level was "nearly gone." He made a differential diagnosis of disc rupture caused by tumor, cancer or infection, and ordered a CT scan to be performed the next morning.

---

[1] Dr. Tubb testified Mrs. Nichols, for the first time, told him on May 21 that she had injured her knee in the course of her employment. Mrs. Nichols disputed this, testifying she informed him that she had hurt her knee on the job during her first visit.

On Tuesday, May 22, a CT scan was administered by Dr. Jimmy Trapp, who found obliteration of the disc space at the C-5/C-6 level and concluded that this area should be evaluated for "bony encroachment on the spinal canal or for (a) herniated cervical disc." Dr. Trapp suggested that Mrs. Nichols return for further scanning because the disc interspace of greatest interest was not fully included on the examination. Dr. McDonald also felt this CT scan was inadequate to make a complete diagnosis, and ordered a myelogram, which he attempted to perform that afternoon. Mrs. Nichols was in such pain, however, the myelogram could not be safely performed. He then ordered a tomogram, which was done and showed the fifth vertebrate had slipped from about four millimeters to a centimeter, and also that there was bone destruction in the upper part of C-6 and lower part of C-5. To adjust this instability, Dr. McDonald ordered a cervical collar, but it was not very effective.

Dr. McDonald had ruled out trauma as a causation, and was still attempting to determine the causation. He ordered a bone scan which was done that afternoon, Wednesday, May 23. Although he had never encountered an infection in this area, he believed she had some type of infection.

In the meantime other tests has been performed and other doctors had been called in consultation. Dr. Antone Tannehill authorized a isotope bone scan and an echocardiogram to explore possible heart problems on May 22. He found no heart problems. Dr. McDonald and Dr. Tannehill discussed possible diagnosis after Tannehill completed his examination of Mrs. Nichols the same day.[2] After reviewing the test results, Tannehill and McDonald agreed that disc space infection was part of their differential diagnosis. Dr. Ben Buchanan, an orthopedic surgeon, aspirated Mrs. Nichols' swollen knee to grow a pyogenic culture. This test revealed Staphylococcus aureus microorganisms, but was not completed until May 25 after Mrs. Nichols was paralyzed.

---

[2] Dr. Tannehill dictated a report on May 23, transcribed on May 25, which stated under the heading Diagnosis: Impression: 1) Arthritis, ? infectious, consider granulomatous (TB vergus fungal), cervical spine and right knee, consider possible bacterial etiology (however afebrile) 2) Hypertension, 3) Mild cardiomyopathy of pregnancy by history, 4) Obesity.

On Thursday, May 24, at 8:30 p.m., Dr. McDonald put Mrs. Nichols in twenty pounds traction by use of Gardner-Wells tongs, his purpose being to pull against the tight muscles pulling her neck forward, let them relax, re-align her spine, reduce pain and subluxation and stabilize her neck. Pins were put in her skull and the tongs put in place and traction applied. A portable x-ray in the room showed the traction had been properly applied.

Shortly after 9:00 p.m., Dr. McDonald, who was still in the hospital, received a call from Mrs. Phyllis Nolan, a registered nurse on duty, who - according to Dr. McDonald - told him Mrs. Nichols had moved and had pain in her neck, and he told her to "watch her closely" and call him if she had any problems..

At 10:00 p.m. Nolan checked and found that Mrs. Nichols could not grip with her hands. She did not consider this to be a drastic change, and did not notify Dr. McDonald. Nolan continued to monitor Mrs. Nichols' condition during the night, and Debbie Hand, a licensed practical nurse, took over the responsibility of charting her condition. At midnight Hand checked on Mrs. Nichols who "appeared to be sleeping." At 3:00 a.m. Mrs. Nichols told Hand that she had a shooting pain down her neck and back, which was treated with a pain reliever. The 4:00 a.m. notation reads: "(Mrs. Nichols) states arms are weaker. Right grip weak. No grip in left hand. Unable to move legs." No one notified Dr. McDonald of this condition. Nolan returned to Mrs. Nichols' room at 5:30 a.m. and saw her right leg jerking. The nurses' notes read "spouse is holding her right leg as she is having frequent jerking movements that cause severe pain in neck area - at present point she states she cannot move any extremeties - P. Nolan, R.N." Thirty minutes later her legs were still jerking and her temperature was 101 degrees. She reported these findings to Dr. McDonald.

According to Dr. McDonald, at 6:00 a.m. on Friday, May 25, he received a call from Nolan, who told him that Mrs. Nichols had had a sudden elevation of her temperature and could no longer move her arms and legs. He got out of bed and went to Mrs. Nichols' room. He found that she was paralyzed, her legs were jumping, and she had no voluntary movement of the lower extremities. She had no sensation beneath the C-6 level.

Dr. McDonald took her into emergency surgery. The traction was re-

was re-applied while she was on the operating table. Surgery at the C-5/C-6 level showed a pocket filled with dark blood with some whiteness appearing to have some pus in it. With a swab he removed about fifteen drops of this substance for analysis. The innerspace was empty. There was no pressure on the spinal cord. He found evidence of bone destruction, a granulation tissue and a thick fibrous mass. He removed pieces of bone debris also for laboratory analysis.

He cut the posterior longitudinal ligament and saw more material epidurally, in front of the dura mater, which also was removed for laboratory examination. He found no lesion or problem with the posterior ligament.

The laboratory results showed that Mrs. Nichols had a staphylococcus aureus infection.

Following Thursday night, May 24, Mrs. Nichols was a quadraplegic.

Suit was filed April 8, 1986, in the circuit court of Lee County against Drs. Tubb and McDonald and the North Mississippi Medical Center for malpractice. Dr. Tubb was charged with failure to properly diagnose Mrs. Nichols, the hospital with improper care, and Dr. McDonald with causing the paralysis in using the tongs as traction. [3]

At trial William Gary, M. D., and Houston Franks, M. D., testified for plaintiffs, and Grayden Tubb, M. D., Tom McDonald, M. D., Robert R. Smith, M. D., and Richard Naef, M. D., testified for the defendants.

PROOF OF MALPRACTICE

William Gary, M. D., a general practitioner, testified Dr. Tubb should have ordered additional x-rays after Lester Willis, M. D., saw a "complete obliteration of the C-6, C-6 disc space" on May 14 from

---

[3] Others were also sued, but later dismissed on motion of the Plaintiff

x-rays taken by Dr. Tubb on May 13. He was of the opinion Dr. Tubb should have referred Mrs. Nichols to either a neurosurgeon or an orthopedic surgeon when he became aware of the disc obliteration. Additionally, with the test results revealing an elevated white blood count, elevated sedimentation rate and high temperature combined with the x-ray analysis, he thought Dr. Tubb's standard of care fell below the minimum standard of care in failing to refer Mrs. Nichols to a specialist in Tupelo on May 15 after he had studied the x-rays and test results.[4]

Houston Franks, M. D., a local orthopedic surgeon, testified that Mrs. Nichols suffered from hematogenous osteomyelitis. In his opinion an infection developed in the knee and was carried through the blood stream into cervical spine area. The infection lodged in one of the vertebrae next to the disc space and eroded the disc space. He opined she developed an abscess of the disc space.

In his opinion, it was poor judgment to apply the Gardner-Wells tongs. He believed this traction contributed to the rupture of the abscess which caused pressure on the spinal cord and subsequent paralysis. The traction pressure also compressed tissue preventing blood from circulating in the cervical spine area. Paralysis would have resulted from pressure on the spine or the interruption of blood flow.

Dr. Franks felt that Dr. McDonald could have prevented Mrs. Nichols' paralysis if he had properly diagnosed and treated her condition. Her infection had progressed for six to eight weeks before its discovery when Mrs. Nichols began to experience pain in her neck days before her first visit with Dr. Tubb. Dr. Franks on cross-examination conceded he had never treated cervical disc space infection and never used the Gardner-Wells tongs.

---

[4] Dr. Tubb disputed Dr. Gary's conclusion that Mrs. Nichols had any fever.

Dr. Franks also agreed that Dr. McDonald had no indications of neurological deficits, which would have warranted surgery before it was performed.

DEFENSE

At trial Dr. Tubb testified that x-rays of Mrs. Nichols' cervical spine showed no evidence of infection or bone destruction. They did indicate narrowing of the disc space, which is consistent wtih a ruptured disc. Furthermore, blood tests and other authorized tests did not reveal any chronic infections. After examining the x-rays and test results,Dr. Tubb thought that Mrs. Nichols had a ruptured disc.

It was Dr. McDonald's opinion that the traction applied to Mrs. Nichols was necessary and properly done, and that it in no way contributed to her problem. No physician who testified was certain what did cause Mrs. Nichols' total paralysis, but it was Dr. McDonald's and Dr. Robert R. Smith's opinion that the infection had caused a thrombosis of the blood vessels leading into Mrs. Nichols' spinal cord and because of the lack of blood supply there was an infarct of the spinal cord at this space resulting in her paralysis.

Dr. Smith was asked from his review of the medical records whether or not there was any injury either caused or contributed to by the application of the cervical traction. He replied, "There is no way traction can cause that." Dr. Smith testified that in his twenty-five years of practice, he had never known of a patient's neck being injured by the use of traction. Dr. Smith is head of the Department of Neurosurgery at the University of Mississippi Medical Center.

Richard Naef, M. D., a specialist in diseases of the nervous spystem, testified that Mrs. Nichols' paralysis was caused when the spinal cord was damaged by "swelling, loss of tissue and . . . inflammation by the adjacent infectious process which affected the dura,. . . the bone (and) the disc cartilage..." There were also symptoms of myelitis and a interrurption of blood supply to the spinal cord caused

by the infectious process, which contributed to the spinal cord damage.

There was no rupture of an abscess damaging the spinal cord according to Naef. The infectious process extended into the spinal canal which cause vasculitis - inflammation of a blood vessel - and cord damage due to ischemia, a deficiency of blood due to contriction or obstruction of the blood vessel. This caused an infarction, damage to the spinal cord tissue, which was the primary nature of the cord damage.

In Dr. Naef's opinion early indications of Mrs. Nichols' spinal cord inflammation were her complaints of weakness during the attempt to perform the myelogram and on the afternoon of May 24, before the traction was applied, when it was noted that her hand grip was weak.

Dr. Naef stated that if surgery had been performed hours earlier, it would not have prevented spinal cord damage because Mrs. Nichols exhibited "symptoms of spinal cord involvement before the tongs were put on." Application of the Garner-Wells tongs was proper to prevent further slippage of the vertebrae.

It was also Dr. Naef's opinion that traction did not cause the paralysis and that the disease process leading to paralysis was only progressing on the night of May 24. Mrs. Nichol's complaint of electricity-like pain was "coincidental."

Following trial there was a jury verdict in favor of all defendants. The Nichols have appealed.

LAW

Although no question has been raised on appeal as to whether the verdict was against the overwhelming weight of the evidence, we have nevertheless summarized the facts necessary for some understanding of what occurred in this very serious case, and the contentions of the parties at trial. The record in this case comprises eighteen volumes.

Further reference to the record will be made in discussing the

issues raised on appeal.

There are only two issues raised on this appeal, the first being that reversible error was committed in allowing testimony that was not revealed in pretrial discovery as required by the Mississippi Rules of Civil Procedure (MRCP), and the second being the erroneous refusal of instructions requested by the plaintiffs.

The Nichols break the first contention into three parts:

1. the defendants were obligated to fully and seasonably respond to plaintiffs' interrogatories,

2. the circuit court erred in allowing testimony not fully and timely disclosed, and

3. Dr. McDonald did not swear to his supplemental answer to interrogatories, and therefore this response was ineffective.

DISCOVERY VIOLATION

It is well known that our Mississippi Rules of Civil Procedure were copied from the Federal Rules of Civil Procedure, and we construe ours as the Federal courts construe the federal rules.

Rule 26 (b) (1), (4) (A) (i) MRCP in pertinent parts provide:

> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. . . . .
>
> . . . . . .
>
> (4) *Trial Preparations: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b) (1) of this rule and acquired or

developed in anticipation of litigation or for trial, may be obtained only as follows"

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Paragraph (b) of Rule 33 MRCP, Interrogatories to Parties, states.

(b) Scope: Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the extent permitted by the rules of evidence.

Rule 33 (a), Interrogatories to Parties, requires that:

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer.

Rule 26 (f) deals with a party's duty to supplement his response to requests for discovery:

(f) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed

> to (A) the identity and location of persons (i) having knowledge of discoverable matters, or (ii) who may be called as witnesses at the trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. (Emphasis added)
>
> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
>
> (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

In this case the Nichols did not take the deposition of any of the defendants, but depended solely upon pretrial interrogatories..

Rules of discovery are to prevent trial by ambush. In no other area is a litigant more vulnerable to ambush than a plaintiff in a malpractice action against a member of some profession. His lawyer must gain knowledge in totally unfamiliar territory, and as best he can navigate a sea of unknown knowledge. There are rocks, shoals, sandbars familiar to a member of the profession which will likely escape the lawyer's attention unless pointed out to him by a member of that profession. For this very reason lawyers in a malpractice action are tempted to be vague and unresponsive to interrogatories addressed to specialized areas of knowledge.

An ordinary fact which has not been disclosed upon pretrial discovery request will be instantly recognized at trial and objected to. A fact in a technical case may be hidden in some generalized, non-specific answer, with trial counsel solemnly proclaiming at trial that the question was answered, the other side just did not recognize It.

Yet, if trial counsel is not afforded time prior to trial to meet and prepare for a particular defense or contention requiring specialized knowledge to grasp and understand, he is ill-equipped to suddenly do so in the middle of the trial.

For this reason, all courts in administering and applying discovery rules must afford the attorney ample time before trial to receive the names of all experts who will be called at trial and meaningful information about their proposed testimony. Rule 26 (b) (4) requires disclosure of "facts known and opinions held by experts," and as to each proposed testifying expert, to state "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." This means that the substance of every fact and every opinion which supports or defends the party's claim or defense must be disclosed and set forth in meaningful information which will enable the opposing side to meet it at trial.

Not only this, the "grounds" or basis of each opinion must be disclosed. If the expert's opinion is based upon his own experience, the answer should so state, and if based upon some other ground, the precise source should be likewise disclosed.

If truth is to be attained in the trial process, it is imperative that the attorneys and experts testifying will be fully knowledgeable as to the other party's contentions and claims well in advance of trial.

Over a quarter of a century ago, when Rule 26 (b) (4) was promulgated in the Federal courts, the comment noted:

> Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative.
>
> . . . .
>
> In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the

> particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

Comments to Rule 26, U.S. C. A.

In *Square D Co. v. Edwards*, 419 So.2d 1227 (Miss. 1982), we reversed a plaintiff's judgment because the plaintiff's expert was permitted to testify to facts only generally referred to in pretrial discovery. *Also, Jones v. Hatchett*, 504 So.2d 198 (Miss. 1987); *State Highway Comm. v. Havard*, 508 So.2d 1099 (Miss. 1987).

The following is the answer of Dr. McDonald to plaintiffs' interrogatory number 10 (d), requesting the "substance of facts and opinions" to which his experts were expected to testify:

> The defendant expects to call Dr. Robert Smith, Department of Neurosurgery, University Medical Center, 2500 North State Street, Jackson, Mississippi 39216 The subject matter on which Dr. Smith is expected to testify is the reasonable diligence, skill and prudence practiced by competent neurosurgeons throughout the United States who have available to them the same general facilities, services, equipment and options available to Dr. McDonald at North Mississippi Medical Center in May through August, 1984. Dr. Smith's opinions will be based on his review of the medical records of the Plaintiff, Frances Nichols, and his background, training and experience in neurosurgery. He is expected to testify that the care and treatment rendered by Dr. McDonald to the Plaintiff, Frances Nichols, was in accordance with the applicable standard of care.

On June 30, 1987, the circuit judge entered a pretrial order

setting trial for January 18, 1988, and giving the defendants until September 30 in which to supplement their answers to interrogatories. Dr. McDonald's supplemental answers listed four additional experts who would testify, including himself, but again the only information as to any of these experts was that they would testify that Dr. McDonald met the appropriate standard of care and did not do or fail to do anything which caused Mrs. Nichols' paralysis. With the exception of Dr. McDonald, none of these added experts testified at trial.

These answers were as foolish and dangerous as they were arrogant. They contained no more information than a pleading. Had this matter gone to trial with no more answer than this, the circuit judge would have been acting well within his discretion in excluding all the specific facts and opinions which Dr. Smith and Dr. McDonald expressed. *Square D. v. Edwards, supra.* [5]

Dr. Tubbs listed two experts and gave some information as to their proposed testimony, only slightly more informative than those of Dr. McDonald, but neither was called to testify.

The Nichols are manifestly correct in their contention that Dr. McDonald did not fully respond to the interrogatory on his expert witnesses. This is not the entire story, however.

In October, 1987, the Nichols moved to compel further discovery, which was considered along with other matters at a pretrial hearing on December 10. At the outset the circuit judge stated:

---

[5] No scientific, professional or technical journal would consider publication of any article which did not contain the basis for every statement of fact, hypothesis or opinion made or advanced by the author. The reason for this is that in order for the article to be of any value to the reader, it must be reliable and trustworthy. And, in order to insure its reliability every statement of fact, opinion or conclusion must be subject to testing. Therefore, every such article tells the reader how the author arrived at each conclusion, namely: by testing, experiments, his own experience, or from other reputable publications or published data.

It would be inconceivable that two reputable scientists or professional men would appear at a seminar in their field to advance opposing points of view without each being given advance notice of the full basis for the opinion of the other. The search for truth in a trial requires no less.

BY THE COURT:

> Counsel for the defendants are cautioned and directed to fully respond as fully as you deem necessary in order to avoid an objection being sustained at the trial when the expert testifies.

Defense counsel all protested that the answers supplied were in compliance with the rules of discovery. Following their extended arguments that they had supplied more than ample information, the court held that he was "not going to compel the defendants to supplement any further; however, Mr. Lawson still has the right to object at the proper time if he feels free - if he desires to at that time, and the Court will rule."

The following then appears in the record:

BY MR. LAWSON:

> I think that is the remedy provided by the rule, Your Honor.

BY MR. BUFKIN:

> Judge, may I inquire? May we have until the first of the year because we've got an intervening Christmas to look at our individual responses and supplement --

BY MR. SMITH:

> And supplement if we do desire?

BY THE COURT:

> Yes Sir.

BY MR. LAWSON:

> I have no objection.

BY MR.BUFKIN:

> I say first of the year; let's just say -- two weeks before the trial. That's roughly the first of the year, but that would be about the fourth of January.

BY MR. LAWSON:

> Okay, y'all have no objection to me having the judge sign an order (about various matters discussed in the conference).

(R.41-42)

On January 4, 1988, Dr. McDonald filed an extended answer to the Nichols interrogatory number 10 setting forth every relevant fact and opinion that was subsequently testified to at trial. It detailed the examination and treatment of Mrs. Nichols, setting forth times and places of all events. Among other things, it stated:

> Dr. McDonald and all of the other expert witnesses which have been previously identified in his supplemental answers to the Plaintiffs' Interrogatories will deny that Dr. McDonald was negligent and it is expected that they will testify that, based upon a reasonable medical probability, Mrs. Nichols had vasculitis or a cervical infarct, neither of which were caused or contributed to by Dr. McDonald's care and treatment ...

(R. 896).

Dr. McDonald did not make oath to these answers. The Nichols did not object to filing the supplemental interrogatories at a late date, did not ask for a continuance, and, with one exception as to a question to Dr. McDonald, noted below, made no objection to the testimony of any defense witness at trial.

Dr. McDonald was called as an adverse witness and at no time

during this examination was an objection lodged because of insufficient answer to discovery. When the plaintiffs rested, he testified as a defense witness, during which examination no objection was made as to any discovery violation. During cross-examination by plaintiffs' counsel, he explained the mechanism of an infarct, a closing down of the blood vessels and blockage, all without objection. On cross-examination by counsel for the Medical Center, he again explained the mechanism of an infarct.

Following this explanation in the record, the Medical Center's counsel proceeded, and got the following response:

> Q. What does -- why does an infarct result?
>
> BY MR. LAWSON:
>
> > Your Honor please, excuse me, but we will object to any testimony now, regarding any infarct because there is nothing about an infarct or anything that they are talking about not anywhere in any of the hospital charts. Now, they are introducing a new cause of action I suppose, or cause of defense into this thing; there just isn't any evidence of it.
>
> BY THE COURT:
>
> > Objection overruled.

(R.1466)

If the Nicholses had any objection to the filing of supplemental answers to interrogatories, it should have been voiced at the December, 1987, pretrial meeting, and if the answers were not being filed sufficiently in advance of January 18, 1988, to prepare for trial, counsel should have moved for a continuance. Moreover, there are hundreds of pages of trial testimony by Drs. Tubb, McDonald and Smith, all without objection, with the one exception above noted. Any insufficiency in pretrial discovery was clearly and manifestly waived

by the Nichols. *Cummins v Century 21 Action Realty*, 563 So. 2d 1382, 1386 (Miss. 1990); *Moore v. Moore*, 558 So. 2d 834, 838 (Miss. 1990); *Griffin v. State*, 557 So. 2d 542, 557 (Miss. 1990); *Jackson V. State*, 551 So. 2d 132, 147 (Miss. 1989).

The Nichols final contention on pretrial discovery is that Dr. McDonald did not make oath to the answer to interrogatory number 10 filed January 4, 1988. This, too, was waived by counsel making no objection to Dr. McDonald's testimony at trial on this (or any other) basis, *Cummins, supra; Moore, supra; Griffin, supra; Jackson, supra.*

II."REFUSED" INSTRUCTIONS

The Nichols' complaint on appeal that the circuit judge erroneously refused and substituted requested plaintiffs' instructions is as far off the record as their contention on discovery violations.[6]

When both sides had rested, the following portions of the record show what transpired in reference to the instructions:

BY THE COURT:

> All right. Gather your proposed instructions up and let's look at them first in chambers, and then after we weed some out, withdraw some, etc., get back out here and we will make a record on the instructions and objections thereto.

There followed in chambers motions by all defendants and then by the plaintiffs for directed verdicts, which the court overruled. The circuit judge then announced, "Court will be in recess until 8:00 in the morning at which time we will go over these instructions."

---

[6] The appellants' briefs were prepared by appellate counsel who took no part in the trial of this case. It is difficult to believe trial counsel would make the same contentions made by appellate counsel.

The record begins the next day with the following:

OBJECTIONS TO INSTRUCTIONS

BY THE COURT:

> All right. As to the proposed Court's instructions that we have reviewed in chambers, do the Plaintiffs have any objections thereto? (Emphasis added)

(R.1926)

There was no objection by the plaintiff. The Circuit judge then turned his attention to the plaintiffs' requested instructions:

INSTRUCTION NO. P-1

BY THE COURT:

> All right. Let's go to the Plaintiffs' instructions, P-1. Mr. Bufkin is there any objection by Defendant Tubb to P-1?

Dr. Tubb's counsel objected to P-1, and the court then asked about Instruction P-2, to which all defendants objected. Following this the court announced:

BY THE COURT:

> P-1 and P-2 will be given. Objections will be noted.

The Circuit judge then went through each of the instructions requested by plaintiffs, namely instructions P-3 through P-7, and after hearing all objections voiced by the various defendants, overruled them all and granted each of the instructions requested by plaintiffs.

The court then went through the remaining instructions requested by the defendants, and after hearing objections by plaintiffs' counsel ruled on the defense instructions.

When all counsel had been given an opportunity to be heard on the requested instructions and objections, if any, thereto, the record shows the following:

BY THE COURT:

Do y'all need a few minutes to get your thoughts together, or are you ready to proceed?

BY MR. LAWSON:

We're ready, your Honor.

BY THE COURT:

Let's take about three minutes while I organize these instructions into some type of reasonable chronological order.

(RECESS)

BY THE COURT:

Let the record reflect that there have been numerous instructions withdrawn. Notation has been made thereon, and they will remain as a part of this file. Also, there have been requests for instructions on punitive damages. Those instructions have been refused since the Court is not of the opinion that this case warrants the giving of any instructions on punitive damage or any award thereon.

BY MR. BUFKIN:

Your Honor, the Court didn't mention our requested peremptory instructions. I assume those are all in the Court's hands and have been refused.

BY THE COURT:

Yes. In addition to those that have been withdrawn,

> there are numerous instructions that have been refused. And the Court has indicated that on the instruction itself, and they will not be a part of this record. We intend, or I am allowing counsel a total of two and a half hours in closing arguments. . . .(emphasis added)

With this record background, the Nichols' complain on appeal that the circuit court "erroneously" refused jury instructions requested by them, and substituted "impermissibly abstract" instructions. They list "proposed" instructions P-1, P-2, P-3, P-4, P-5, P-6 and P-11. While these instructions which they complain were erroneously "refused" appear in the record, none is stamped as "filed,," and instruction P-4, P-5 and P-6 show they were withdrawn, and P-1, P-3 and P-11 are marked "refused."

The Nichols' counsel made no record whatever as to these instructions. Counsel did not mention them, or call any of them to the attention of the court during the hearing in chambers on the instructions. If there had been any confusion or oversight over the absence of any discussion of them in the record, counsel also had an opportunity to call them to the attention of the court in a motion for a new trial, request a hearing thereon, and make a proper record of precisely what occurred in reference to these instructions.

As this record shows, every single instruction requested by the plaintiffs on the record was granted, Appellate counsel asks us to speculate as to the others. This Court has no way of knowing what occurred in reference to them. It is of concern to this Court that counsel would ask us to surmise as to instructions which were never presented to the circuit court for a ruling on the record. It is in poor grace when experienced and able counsel are afforded an opportunity to make a clear and unambiguous trial record do not see fit to do so, yet claim some alleged error from an incomplete, ambiguous or uncertain record they were at least partly responsible in creating in the first instance. If counsel for any party wants a circuit judge to consider a proposed instruction, it is his duty to submit such instruction on the record, and have the court make a ruling thereon on the record. Any error predicated upon the granting or refusing of an instruction must come

from an instruction presented to the circuit court on the record, and a ruling thereon made on the record.

In *Wilson v. Johnson*, 493 So.2d 947, 950 (Miss. 1986), we held:

> This court simply refuses to review any allegation of error which is unsupported by the record. We have stated this upon innumerable occasions.
>
> Generally a court reporter is available there in court for a party to see that a proper record is made. In the event there is no court reporter, or the court reporter fails to make a proper record, or accurate record, the party can prepare a bill of exceptions. (Emphasis added)
>
> What we have said in this opinion about the necessity of making a record of any alleged error is a belabored repeat of the obvious. Because attorneys continue to allege in briefs facts on which a record is blank, we are constrained to once again make the point. If something happens in a trial court about which a party feels aggrieved, he will not be allowed to complain of it on appeal unless he gets it in the record.

Nor is this case, as counsel would have it, in which a party submitted an erroneous instruction which the court refused without reforming it, thereby leaving the jury uninstructed on a crucial legal issue. *Byrd v. McGill*, 478 So.2d 302 (Miss. 1985). In this case all plaintiffs' instructions requested on the record were granted and they fairly and fully instructed the jury on the legal issues from which the jury was to determine the facts.

Finding no error, we affirm.

AFFIRMED.

ROY NOBLE LEE, C.J., PRATHER, ROBERTSON, PITTMAN AND BANKS, JJ., CONCUR. SULLIVAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY McRAE, J., McRAE J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DAN LEE, P. J., AND SULLIVAN, J.

In The

Supreme Court of Mississippi

No. 89-CA-0590

FRANCES NICHOLS AND DAVID NICHOLS

V.

GRAYDEN TUBB, M.D., TOM McDONALD, M.D., AND NORTH MISSISSIPPI MEDICAL CENTER

SULLIVAN, JUSTICE, DISSENTING:

Under the authority of our decision in *McCullom v. Franklin*, ——— So. 2d ——— (No. 07-CA-59638, decided June 10, 1992, not yet reported), I would reverse and remand this case. I therefore dissent.

McRAE, J., JOINS THIS DISSENT.

In The

Supreme Court of Mississippi

No. 89-CA-590

FRANCES NICHOLS AND DAVID NICHOLS

V.

GRAYDEN TUBB, M.D., TOM McDONALD, M.D., AND NORTH MISSISSIPPI MEDICAL CENTER

McRAE, JUSTICE, DISSENTING:

Upon reading the record, it becomes apparent that most of the appellants' wounds are self-inflicted. The outcome of this case would undoubtedly have been far different had trial counsel been more vigilant. Accordingly, I join Justice Sullivan's dissenting opinion.

I would go further, however, and hold that the case should be reversed as to the defendant, McDonald, on grounds of properly preserved error. Dr. McDonald's initial answers to the plaintiffs' interrogatories, as the majority correctly notes, were woefully inadequate under our rules of civil procedure. McDonald never filed a valid supplementation, and the plaintiffs raised a timely objection at trial to McDonald's testimony concerning pertinent matters which McDonald's answers to interrogatories failed to address. The majority errs in holding that the plaintiffs waived McDonald's failure to file an appropriate response to interrogatories.

The plaintiffs propounded to Tom McDonald an interrogatory which requested the "substance of facts and opinions" concerning the testimony of his experts. McDonald's response stated that the experts, not he, would testify that McDonald's treatment "was in accordance with the applicable standard of care." Nowhere does the answer state

which standard of care the experts would apply; nor does it discuss the specifics of how, in the opinion of the potential experts, Dr. McDonald's treatment met the "applicable standard of care." Dr. McDonald's answer to the plaintiffs' interrogatory thus fell far short of the requirements of MRCP RULE 26 (b) (4) (A) (i) which requires the respondent to "state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." It is true that Dr. McDonald filed a supplemental response in January 4, 1988, which provided more specific answers to the plaintiffs' interrogatories, and also for the first time included himself as an expert. He can say that he just realized he was an expert on January 4, 1988. He and his attorney knew that he would give an expert opinion in this case from Day One. This supplemental response was ineffective, however, for three reasons: (1) it was untimely; (2) the court did not grant McDonald permission to file a tardy supplementation; and(3) it was unsworn.

MRCP Rule 26 (f) (2) states that "(a) party is under a duty seasonably to amend a prior response if he obtains information" which renders the initial response inadequate or where "a failure to amend the response is in substance a knowing concealment." "Seasonably" does not mean several months later. It means immediately. McDonald propounded his blatently inadequate answers to plaintiffs' interrogatories on August 27, 1986. Thus, well over one year passed before he filed a more detailed response. Clearly, McDonald's supplemental answers were unseasonable and therefore did not bring his discovery responses into compliance with Rule 26.

The majority finds that the plaintiffs waived McDonald's failure to file a seasonable supplemental answer when, at the pretrial conference, counsel for the plaintiff stated that he had "no objection" to allowing supplementation as late as the first of 1988. The majority neglects to note, however, that the trial court granted an extension of time to supplement only to Dr. Tubb(represented by attorney Bufkin and Dr. Willis (a defendant, represented by attorney Smith, who was subsequently dismissed from the suit). Dr. McDonald did not request an extension and was not granted one. He therfore had no authority or leave to file his untimely supplementary answers to interrogatories on January 4, 1988. To compound his error, he did not even submit his

attempted supplementary responses under oath as required by MRCP Rule 33 (a). Clearly, the answers Dr. McDonald filed on January 4, 1988 were absolutely invalid and to no avail. For our purposes in reviewing this case, we should treat them as if they did not even exist.

The majority also concludes that if the plaintiffs had wished to have more time after the January supplementations to prepare for trial, they should have moved for a continuance. This proposition is soundly defeated by *Huff v. Polk*, 408 So. 2d 1368 (Miss. 1982), wherein this Court held where a party files a tardy discovery response, the other party does not waive the discovery violation by failing to seek a continuance.

At trial, Dr. McDonald testified as an expert in his own behalf. While being examined by the Medical Center's counsel, he stated that Frances Nichol's injury resulted from an "infarct," or a closing down and blockage of blood vessels, and not from his treatment methods. Counsel for the plaintiffs interposed an objection:

> Your Honor please, excuse me, but we will object to any testimony now, regarding any infarct because there is nothing about an infarct or anything that they are talking about not anywhere in any of the hospital charts. Now, they are introducing a new cause of action I suppose, or cause of defense into this thing; there just isn't any evidence of it.

Articulate it is not, but there can be little doubt that this objection addresses defendant McDonald's failure to adequately divulge the substance of his proposed testimony in discovery. The trial court should have sustained the objection and instructed Dr. McDonald not to testify concerning facts not disclosed in his responses to the plaintiffs' discovery requests. The trial court's failure to do so constitutes reversable error. *Square D. Co. v. Edwards*, 419 So. 2 d 1227 (Miss. 1982) (allowing expert to testify to facts only generally referred to in pretrial discovery requires reversal).

I would reverse and remand as to the plaintiffs' action against Dr.

McDonald on grounds that the trial court should not have permitted McDonald to testify concerning facts not disclosed in response to plaintiffs' discovery requests. I would reverse and remand the entire case in accordance with *McCollum v. Franklin*, No. 07-CA-59638 (June 10, 1992) (not-yet-published opinion) as proposed by Justice Sullivan.

DAN LEE, P.J., and SULLIVAN, J., JOIN THIS OPINION.

92-1818

No.

MAR 29 1993

OFFICE OF THE CLER

In The

Supreme Court of the United States

October Term, 1993

FRANCES NICHOLS and DAVID NICHOLS

Petitioners,

VERSUS

GRAYDEN TUBB, M.D., TOM McDONALD, M.D. and NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

SUPPLEMENTAL APPENDIX

JIM WAIDE
(Counsel of Record)
WAIDE LAW OFFICE
ATTORNEYS AT LAW
P. O. BOX 1357
TUPELO, MS 38802
601/842-7324

WILLIAM S. LAWSON
ATTORNEY AT LAW
POST OFFICE BOX 848
TUPELO, MS 38802
601/842-8711

Attorneys for Petitioners

In The

Supreme Court of Mississippi

No. 89-CA-0590

FRANCES NICHOLS AND DAVID NICHOLS

v.

GRAYDEN TUBB, M. D. TOM McDONALD, M. D., AND NORTH MISSISSIPPI MEDICAL CENTER

EN BANC.

HAWKINS, PRESIDING JUSTICE, FOR THE COURT:

Frances and David Nichols appeal from a jury verdict and judgment in the circuit court of Lee County in favor of Grayden Tubb, M. D., Tom McDonald, M. D., and North Mississippi Medical Center in a malpractice suit. On appeal the Nichols contend there was a discovery violation and erroneous refusal of instructions requested by plaintiffs. We find no error and affirm.

FACTS

On Friday, April 13, 1984, Mrs. Nichols, as a patient, went to Dr. Tubb's office in Fulton, complaining of pain in the left side of her neck. She told him she had not been injured. She had no fever. He did an ear, nose and throat examination, and checked her reflexes. He concluded she had a crick, administered an injection of prednisolone and lidocaine, and prescribed 40 soma compound, a combination muscle relaxant and aspirin. He then told her to return if she did not get to feeling better.

Mrs. Nichols returned Tuesday, April 17, this time complaining of pain in the right side of her neck. She had no fever. He diagnosed her as having an acute fibrositis of the sternocleidomastoid muscle. He gave her another injection, and told her to return if she did not get all right.

She returned Monday, April 30, this time complaining of her right knee, which was swollen. She had no fever, and again told him that she was still having trouble with her neck. Dr. Tubb noticed that her knee was puffy, and Mrs. Nichols told him she had experienced congestive heart failure with the birth of her last child eleven or twelve years earlier and had to take digitalis for two years, and was advised not to have any more children. Dr. Tubb silently concluded this was probably her problem, but in order not to alarm her, said nothing. He termed her problem "idiopathic edema" and treated her with lasix, a first medication in congestive heart failure. He also prescribed meclomen, a non-steriodal anti-inflammatory drug.

Mrs. Nichols returned Wednesday, May 2, complaining of her swollen right knee, and of being nervous. She told him she was tense, anxious, and wanted something for her nerves.

She returned on Saturday, May 12, feeling "extremely bad." She continued to have pain in her neck and knee. He diagnosed her ailments as congestive heart failure and arthritis, and hospitalized her, telling her that if her condition did not improve, he would have to send her to the North Mississippi Medical Center (Medical Center) in Tupelo. X-rays and blood tests showed Mrs. Nichols had a completely obliterated disc space between the C-5/C-6 vertebra, and an elevated white blood count. Dr. Tubb's diagnosis was ruptured disc. While hospitalized in Fulton, Mrs. Nichols used a walker.

Mrs. Nichols' condition did not improve, and on Monday morning, May 21, Dr. Tubb telephoned Dr. McDonald, a neurosurgeon, and she was transferred to North Mississippi Medical Center, where Dr. McDonald first saw Mrs. Nichols in the emergency room, and examined x-rays taken in Fulton on May 13.[1] He noticed a subluxation at the C-5/C-6 level, a slipping of C-5 vertebrate back on C-6 approximately four millimeters, "a little spur" and osteoarthritis, and that the disc space at the C-5/C-6 level was "nearly gone." He made a differential diagnosis of disc rupture caused by tumor, cancer or infection, and ordered a CT scan to be performed the next morning.

---

[1] Dr. Tubb testified Mrs. Nichols, for the first time, told him on May 21 that she had injured her knee in the course of her employment. Mrs. Nichols disputed this, testifying she informed him that she had hurt her knee on the job during her first visit.

On Tuesday, May 22, a CT scan was administered by Dr. Jimmy Trapp, who found obliteration of the disc space at the C-5/C-6 level and concluded that this area should be evaluated for "bony encroachment on the spinal canal or for (a) herniated cervical disc." Dr. Trapp suggested that Mrs. Nichols return for further scanning because the disc interspace of greatest interest was not fully included on the examination. Dr. McDonald also felt this CT scan was inadequate to make a complete diagnosis, and ordered a myelogram, which he attempted to perform that afternoon. Mrs. Nichols was in such pain, however, the myelogram could not be safely performed. He then ordered a tomogram, which was done and showed the fifth vertebrate had slipped from about four millimeters to a centimeter, and also that there was bone destruction in the upper part of C-6 and lower part of C-5. To adjust this instability, Dr. McDonald ordered a cervical collar, but it was not very effective.

Dr. McDonald had ruled out trauma as a causation, and was still attempting to determine the causation. He ordered a bone scan which was done that afternoon, Wednesday, May 23. Although he had never encountered an infection in this area, he believed she had some type of infection.

In the meantime other tests has been performed and other doctors had been called in consultation. Dr. Antone Tannehill authorized a isotope bone scan and an echocardiogram to explore possible heart problems on May 22. He found no heart problems. Dr. McDonald and Dr. Tannehill discussed possible diagnosis after Tannehill completed his examination of Mrs. Nichols the same day.[2] After reviewing the test results, Tannehill and McDonald agreed that disc space infection was part of their differential diagnosis. Dr. Ben Buchanan, an orthopedic surgeon, aspirated Mrs. Nichols' swollen knee to grow a pyogenic culture. This test revealed Staphylococcus aureus microorganisms, but was not completed until May 25 after Mrs. Nichols was paralyzed.

---

[2] Dr. Tannehill dictated a report on May 23, transcribed on May 25, which stated under the heading Diagnosis: Impression: 1) Arthritis, ? infectious, consider granulomatous (TB vergus fungal), cervical spine and right knee, consider possible bacterial etiology (however afebrile) 2) Hypertension, 3) Mild cardiomyopathy of pregnancy by history, 4) Obesity.

On Thursday, May 24, at 8:30 p.m., Dr. McDonald put Mrs. Nichols in twenty pounds traction by use of Gardner-Wells tongs, his purpose being to pull against the tight muscles pulling her neck forward, let them relax, re-align her spine, reduce pain and subluxation and stabilize her neck. Pins were put in her skull and the tongs put in place and traction applied. A portable x-ray in the room showed the traction had been properly applied.

Shortly after 9:00 p.m., Dr. McDonald, who was still in the hospital, received a call from Mrs. Phyllis Nolan, a registered nurse on duty, who - according to Dr. McDonald - told him Mrs. Nichols had moved and had pain in her neck, and he told her to "watch her closely" and call him if she had any problems..

At 10:00 p.m. Nolan checked and found that Mrs. Nichols could not grip with her hands. She did not consider this to be a drastic change, and did not notify Dr. McDonald. Nolan continued to monitor Mrs. Nichols' condition during the night, and Debbie Hand, a licensed practical nurse, took over the responsibility of charting her condition. At midnight Hand checked on Mrs. Nichols who "appeared to be sleeping." At 3:00 a.m. Mrs. Nichols told Hand that she had a shooting pain down her neck and back, which was treated with a pain reliever. The 4:00 a.m. notation reads: "(Mrs. Nichols) states arms are weaker. Right grip weak. No grip in left hand. Unable to move legs." No one notified Dr. McDonald of this condition. Nolan returned to Mrs. Nichols' room at 5:30 a.m. and saw her right leg jerking. The nurses' notes read "spouse is holding her right leg as she is having frequent jerking movements that cause severe pain in neck area - at present point she states she cannot move any extremeties - P. Nolan, R.N." Thirty minutes later her legs were still jerking and her temperature was 101 degrees. She reported these findings to Dr. McDonald.

According to Dr. McDonald, at 6:00 a.m. on Friday, May 25, he received a call from Nolan, who told him that Mrs. Nichols had had a sudden elevation of her temperature and could no longer move her arms and legs. He got out of bed and went to Mrs. Nichols' room. He found that she was paralyzed, her legs were jumping, and she had no voluntary movement of the lower extremities. She had no sensation beneath the C-6 level.

Dr. McDonald took her into emergency surgery. The traction was re-

was re-applied while she was on the operating table. Surgery at the C-5/C-6 level showed a pocket filled with dark blood with some whiteness appearing to have some pus in it. With a swab he removed about fifteen drops of this substance for analysis. The innerspace was empty. There was no pressure on the spinal cord. He found evidence of bone destruction, a granulation tissue and a thick fibrous mass. He removed pieces of bone debris also for laboratory analysis.

He cut the posterior longitudinal ligament and saw more material epidurally, in front of the dura mater, which also was removed for laboratory examination. He found no lesion or problem with the posterior ligament.

The laboratory results showed that Mrs. Nichols had a staphylococcus aureus infection.

Following Thursday night, May 24, Mrs. Nichols was a quadraplegic.

Suit was filed April 8, 1986, in the circuit court of Lee County against Drs. Tubb and McDonald and the North Mississippi Medical Center for malpractice. Dr. Tubb was charged with failure to properly diagnose Mrs. Nichols, the hospital with improper care, and Dr. McDonald with causing the paralysis in using the tongs as traction. [3]

At trial William Gary, M. D., and Houston Franks, M. D., testified for plaintiffs, and Grayden Tubb, M. D., Tom McDonald, M. D., Robert R. Smith, M. D., and Richard Naef, M. D., testified for the defendants.

PROOF OF MALPRACTICE

William Gary, M. D., a general practitioner, testified Dr. Tubb should have ordered additional x-rays after Lester Willis, M. D., saw a "complete obliteration of the C-6, C-6 disc space" on May 14 from

---

[3] Others were also sued, but later dismissed on motion of the Plaintiff

x-rays taken by Dr. Tubb on May 13. He was of the opinion Dr. Tubb should have referred Mrs. Nichols to either a neurosurgeon or an orthopedic surgeon when he became aware of the disc obliteration. Additionally, with the test results revealing an elevated white blood count, elevated sedimentation rate and high temperature combined with the x-ray analysis, he thought Dr. Tubb's standard of care fell below the minimum standard of care in failing to refer Mrs. Nichols to a specialist in Tupelo on May 15 after he had studied the x-rays and test results.[4]

Houston Franks, M. D., a local orthopedic surgeon, testified that Mrs. Nichols suffered from hematogenous osteomyelitis. In his opinion an infection developed in the knee and was carried through the blood stream into cervical spine area. The infection lodged in one of the vertebrae next to the disc space and eroded the disc space. He opined she developed an abscess of the disc space.

In his opinion, it was poor judgment to apply the Gardner-Wells tongs. He believed this traction contributed to the rupture of the abscess which caused pressure on the spinal cord and subsequent paralysis. The traction pressure also compressed tissue preventing blood from circulating in the cervical spine area. Paralysis would have resulted from pressure on the spine or the interruption of blood flow.

Dr. Franks felt that Dr. McDonald could have prevented Mrs. Nichols' paralysis if he had properly diagnosed and treated her condition. Her infection had progressed for six to eight weeks before its discovery when Mrs. Nichols began to experience pain in her neck days before her first visit with Dr. Tubb. Dr. Franks on cross-examination conceded he had never treated cervical disc space infection and never used the Gardner-Wells tongs.

---

[4] Dr. Tubb disputed Dr. Gary's conclusion that Mrs. Nichols had any fever.

Dr. Franks also agreed that Dr. McDonald had no indications of neurological deficits, which would have warranted surgery before it was performed.

DEFENSE

At trial Dr. Tubb testified that x-rays of Mrs. Nichols' cervical spine showed no evidence of infection or bone destruction. They did indicate narrowing of the disc space, which is consistent wtih a ruptured disc. Furthermore, blood tests and other authorized tests did not reveal any chronic infections. After examining the x-rays and test results,Dr. Tubb thought that Mrs. Nichols had a ruptured disc.

It was Dr. McDonald's opinion that the traction applied to Mrs. Nichols was necessary and properly done, and that it in no way contributed to her problem. No physician who testified was certain what did cause Mrs. Nichols' total paralysis, but it was Dr. McDonald's and Dr. Robert R. Smith's opinion that the infection had caused a thrombosis of the blood vessels leading into Mrs. Nichols' spinal cord and because of the lack of blood supply there was an infarct of the spinal cord at this space resulting in her paralysis.

Dr. Smith was asked from his review of the medical records whether or not there was any injury either caused or contributed to by the application of the cervical traction. He replied, "There is no way traction can cause that." Dr. Smith testified that in his twenty-five years of practice, he had never known of a patient's neck being injured by the use of traction. Dr. Smith is head of the Department of Neurosurgery at the University of Mississippi Medical Center.

Richard Naef, M. D., a specialist in diseases of the nervous spystem, testified that Mrs. Nichols' paralysis was caused when the spinal cord was damaged by "swelling, loss of tissue and . . . inflammation by the adjacent infectious process which affected the dura,. . . the bone (and) the disc cartilage..." There were also symptoms of myelitis and a interrurption of blood supply to the spinal cord caused

by the infectious process, which contributed to the spinal cord damage.

There was no rupture of an abscess damaging the spinal cord according to Naef. The infectious process extended into the spinal canal which cause vasculitis - inflammation of a blood vessel - and cord damage due to ischemia, a deficiency of blood due to contriction or obstruction of the blood vessel. This caused an infarction, damage to the spinal cord tissue, which was the primary nature of the cord damage.

In Dr. Naef's opinion early indications of Mrs. Nichols' spinal cord inflammation were her complaints of weakness during the attempt to perform the myelogram and on the afternoon of May 24, before the traction was applied, when it was noted that her hand grip was weak.

Dr. Naef stated that if surgery had been performed hours earlier, it would not have prevented spinal cord damage because Mrs. Nichols exhibited "symptoms of spinal cord involvement before the tongs were put on." Application of the Garner-Wells tongs was proper to prevent further slippage of the vertebrae.

It was also Dr. Naef's opinion that traction did not cause the paralysis and that the disease process leading to paralysis was only progressing on the night of May 24. Mrs. Nichol's complaint of electricity-like pain was "coincidental."

Following trial there was a jury verdict in favor of all defendants. The Nichols have appealed.

LAW

Although no question has been raised on appeal as to whether the verdict was against the overwhelming weight of the evidence, we have nevertheless summarized the facts necessary for some understanding of what occurred in this very serious case, and the contentions of the parties at trial. The record in this case comprises eighteen volumes.

Further reference to the record will be made in discussing the

issues raised on appeal.

There are only two issues raised on this appeal, the first being that reversible error was committed in allowing testimony that was not revealed in pretrial discovery as required by the Mississippi Rules of Civil Procedure (MRCP), and the second being the erroneous refusal of instructions requested by the plaintiffs.

The Nichols break the first contention into three parts:

1. the defendants were obligated to fully and seasonably respond to plaintiffs' interrogatories,

2. the circuit court erred in allowing testimony not fully and timely disclosed, and

3. Dr. McDonald did not swear to his supplemental answer to interrogatories, and therefore this response was ineffective.

DISCOVERY VIOLATION

It is well known that our Mississippi Rules of Civil Procedure were copied from the Federal Rules of Civil Procedure, and we construe ours as the Federal courts construe the federal rules.

Rule 26 (b) (1), (4) (A) (i) MRCP in pertinent parts provide:

> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. . . . .
>
> . . . . . .
>
> (4) *Trial Preparations: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b) (1) of this rule and acquired or

developed in anticipation of litigation or for trial, may be obtained only as follows"

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Paragraph (b) of Rule 33 MRCP, Interrogatories to Parties, states.

(b) Scope: Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the extent permitted by the rules of evidence.

Rule 33 (a), Interrogatories to Parties, requires that:

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer.

Rule 26 (f) deals with a party's duty to supplement his response to requests for discovery:

(f) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed

> to (A) the identity and location of persons (i) having knowledge of discoverable matters, or (ii) who may be called as witnesses at the trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. (Emphasis added)
>
> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
>
> (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

In this case the Nichols did not take the deposition of any of the defendants, but depended solely upon pretrial interrogatories..

Rules of discovery are to prevent trial by ambush. In no other area is a litigant more vulnerable to ambush than a plaintiff in a malpractice action against a member of some profession. His lawyer must gain knowledge in totally unfamiliar territory, and as best he can navigate a sea of unknown knowledge. There are rocks, shoals, sandbars familiar to a member of the profession which will likely escape the lawyer's attention unless pointed out to him by a member of that profession. For this very reason lawyers in a malpractice action are tempted to be vague and unresponsive to interrogatories addressed to specialized areas of knowledge.

An ordinary fact which has not been disclosed upon pretrial discovery request will be instantly recognized at trial and objected to. A fact in a technical case may be hidden in some generalized, non-specific answer, with trial counsel solemnly proclaiming at trial that the question was answered, the other side just did not recognize It.

Yet, if trial counsel is not afforded time prior to trial to meet and prepare for a particular defense or contention requiring specialized knowledge to grasp and understand, he is ill-equipped to suddenly do so in the middle of the trial.

For this reason, all courts in administering and applying discovery rules must afford the attorney ample time before trial to receive the names of all experts who will be called at trial and meaningful information about their proposed testimony. Rule 26 (b) (4) requires disclosure of "facts known and opinions held by experts," and as to each proposed testifying expert, to state "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." This means that the substance of every fact and every opinion which supports or defends the party's claim or defense must be disclosed and set forth in meaningful information which will enable the opposing side to meet it at trial.

Not only this, the "grounds" or basis of each opinion must be disclosed. If the expert's opinion is based upon his own experience, the answer should so state, and if based upon some other ground, the precise source should be likewise disclosed.

If truth is to be attained in the trial process, it is imperative that the attorneys and experts testifying will be fully knowledgeable as to the other party's contentions and claims well in advance of trial.

Over a quarter of a century ago, when Rule 26 (b) (4) was promulgated in the Federal courts, the comment noted:

> Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative.
>
> . . . .
>
> In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the

> particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

Comments to Rule 26, U.S. C. A.

In *Square D Co. v. Edwards*, 419 So.2d 1227 (Miss. 1982), we reversed a plaintiff's judgment because the plaintiff's expert was permitted to testify to facts only generally referred to in pretrial discovery. *Also, Jones v. Hatchett*, 504 So.2d 198 (Miss. 1987); *State Highway Comm. v. Havard*, 508 So.2d 1099 (Miss. 1987).

The following is the answer of Dr. McDonald to plaintiffs' interrogatory number 10 (d), requesting the "substance of facts and opinions" to which his experts were expected to testify:

> The defendant expects to call Dr. Robert Smith, Department of Neurosurgery, University Medical Center, 2500 North State Street, Jackson, Mississippi 39216 The subject matter on which Dr. Smith is expected to testify is the reasonable diligence, skill and prudence practiced by competent neurosurgeons throughout the United States who have available to them the same general facilities, services, equipment and options available to Dr. McDonald at North Mississippi Medical Center in May through August, 1984. Dr. Smith's opinions will be based on his review of the medical records of the Plaintiff, Frances Nichols, and his background, training and experience in neurosurgery. He is expected to testify that the care and treatment rendered by Dr. McDonald to the Plaintiff, Frances Nichols, was in accordance with the applicable standard of care.

On June 30, 1987, the circuit judge entered a pretrial order

setting trial for January 18, 1988, and giving the defendants until September 30 in which to supplement their answers to interrogatories. Dr. McDonald's supplemental answers listed four additional experts who would testify, including himself, but again the only information as to any of these experts was that they would testify that Dr. McDonald met the appropriate standard of care and did not do or fail to do anything which caused Mrs. Nichols' paralysis. With the exception of Dr. McDonald, none of these added experts testified at trial.

These answers were as foolish and dangerous as they were arrogant. They contained no more information than a pleading. Had this matter gone to trial with no more answer than this, the circuit judge would have been acting well within his discretion in excluding all the specific facts and opinions which Dr. Smith and Dr. McDonald expressed. *Square D. v. Edwards, supra.* [5]

Dr. Tubbs listed two experts and gave some information as to their proposed testimony, only slightly more informative than those of Dr. McDonald, but neither was called to testify.

The Nichols are manifestly correct in their contention that Dr. McDonald did not fully respond to the interrogatory on his expert witnesses. This is not the entire story, however.

In October, 1987, the Nichols moved to compel further discovery, which was considered along with other matters at a pretrial hearing on December 10. At the outset the circuit judge stated:

---

[5] No scientific, professional or technical journal would consider publication of any article which did not contain the basis for every statement of fact, hypothesis or opinion made or advanced by the author. The reason for this is that in order for the article to be of any value to the reader, it must be reliable and trustworthy. And, in order to insure its reliability every statement of fact, opinion or conclusion must be subject to testing. Therefore, every such article tells the reader how the author arrived at each conclusion, namely: by testing, experiments, his own experience, or from other reputable publications or published data.

It would be inconceivable that two reputable scientists or professional men would appear at a seminar in their field to advance opposing points of view without each being given advance notice of the full basis for the opinion of the other. The search for truth in a trial requires no less.

BY THE COURT:

> Counsel for the defendants are cautioned and directed to fully respond as fully as you deem necessary in order to avoid an objection being sustained at the trial when the expert testifies.

Defense counsel all protested that the answers supplied were in compliance with the rules of discovery. Following their extended arguments that they had supplied more than ample information, the court held that he was "not going to compel the defendants to supplement any further; however, Mr. Lawson still has the right to object at the proper time if he feels free - if he desires to at that time, and the Court will rule."

The following then appears in the record:

BY MR. LAWSON:

> I think that is the remedy provided by the rule, Your Honor.

BY MR. BUFKIN:

> Judge, may I inquire? May we have until the first of the year because we've got an intervening Christmas to look at our individual responses and supplement --

BY MR. SMITH:

> And supplement if we do desire?

BY THE COURT:

> Yes Sir.

BY MR. LAWSON:

> I have no objection.

BY MR.BUFKIN:

> I say first of the year; let's just say -- two weeks before the trial. That's roughly the first of the year, but that would be about the fourth of January.

BY MR. LAWSON:

> Okay, y'all have no objection to me having the judge sign an order (about various matters discussed in the conference).

(R.41-42)

On January 4, 1988, Dr. McDonald filed an extended answer to the Nichols interrogatory number 10 setting forth every relevant fact and opinion that was subsequently testified to at trial. It detailed the examination and treatment of Mrs. Nichols, setting forth times and places of all events. Among other things, it stated:

> Dr. McDonald and all of the other expert witnesses which have been previously identified in his supplemental answers to the Plaintiffs' Interrogatories will deny that Dr. McDonald was negligent and it is expected that they will testify that, based upon a reasonable medical probability, Mrs. Nichols had vasculitis or a cervical infarct, neither of which were caused or contributed to by Dr. McDonald's care and treatment ...

(R. 896).

Dr. McDonald did not make oath to these answers. The Nichols did not object to filing the supplemental interrogatories at a late date, did not ask for a continuance, and, with one exception as to a question to Dr. McDonald, noted below, made no objection to the testimony of any defense witness at trial.

Dr. McDonald was called as an adverse witness and at no time

during this examination was an objection lodged because of insufficient answer to discovery. When the plaintiffs rested, he testified as a defense witness, during which examination no objection was made as to any discovery violation. During cross-examination by plaintiffs' counsel, he explained the mechanism of an infarct, a closing down of the blood vessels and blockage, all without objection. On cross-examination by counsel for the Medical Center, he again explained the mechanism of an infarct.

Following this explanation in the record, the Medical Center's counsel proceeded, and got the following response:

> Q. What does -- why does an infarct result?
>
> BY MR. LAWSON:
>
> > Your Honor please, excuse me, but we will object to any testimony now, regarding any infarct because there is nothing about an infarct or anything that they are talking about not anywhere in any of the hospital charts. Now, they are introducing a new cause of action I suppose, or cause of defense into this thing; there just isn't any evidence of it.
>
> BY THE COURT:
>
> > Objection overruled.

(R.1466)

If the Nicholses had any objection to the filing of supplemental answers to interrogatories, it should have been voiced at the December, 1987, pretrial meeting, and if the answers were not being filed sufficiently in advance of January 18, 1988, to prepare for trial, counsel should have moved for a continuance. Moreover, there are hundreds of pages of trial testimony by Drs. Tubb, McDonald and Smith, all without objection, with the one exception above noted. Any insufficiency in pretrial discovery was clearly and manifestly waived

by the Nichols. *Cummins v Century 21 Action Realty*, 563 So. 2d 1382, 1386 (Miss. 1990); *Moore v. Moore*, 558 So. 2d 834, 838 (Miss. 1990); *Griffin v. State*, 557 So. 2d 542, 557 (Miss. 1990); *Jackson V. State*, 551 So. 2d 132, 147 (Miss. 1989).

The Nichols final contention on pretrial discovery is that Dr. McDonald did not make oath to the answer to interrogatory number 10 filed January 4, 1988. This, too, was waived by counsel making no objection to Dr. McDonald's testimony at trial on this (or any other) basis, *Cummins, supra; Moore, supra; Griffin, supra; Jackson, supra.*

II."REFUSED" INSTRUCTIONS

The Nichols' complaint on appeal that the circuit judge erroneously refused and substituted requested plaintiffs' instructions is as far off the record as their contention on discovery violations.[6]

When both sides had rested, the following portions of the record show what transpired in reference to the instructions:

BY THE COURT:

> All right. Gather your proposed instructions up and let's look at them first in chambers, and then after we weed some out, withdraw some, etc., get back out here and we will make a record on the instructions and objections thereto.

There followed in chambers motions by all defendants and then by the plaintiffs for directed verdicts, which the court overruled. The circuit judge then announced, "Court will be in recess until 8:00 in the morning at which time we will go over these instructions."

---

[6] The appellants' briefs were prepared by appellate counsel who took no part in the trial of this case. It is difficult to believe trial counsel would make the same contentions made by appellate counsel.

The record begins the next day with the following:

OBJECTIONS TO INSTRUCTIONS

BY THE COURT:

> All right. As to the proposed Court's instructions that we have reviewed in chambers, do the Plaintiffs have any objections thereto? (Emphasis added)

(R.1926)

There was no objection by the plaintiff. The Circuit judge then turned his attention to the plaintiffs' requested instructions:

INSTRUCTION NO. P-1

BY THE COURT:

> All right. Let's go to the Plaintiffs' instructions, P-1. Mr. Bufkin is there any objection by Defendant Tubb to P-1?

Dr. Tubb's counsel objected to P-1, and the court then asked about Instruction P-2, to which all defendants objected. Following this the court announced:

BY THE COURT:

> P-1 and P-2 will be given. Objections will be noted.

The Circuit judge then went through each of the instructions requested by plaintiffs, namely instructions P-3 through P-7, and after hearing all objections voiced by the various defendants, overruled them all and granted each of the instructions requested by plaintiffs.

The court then went through the remaining instructions requested by the defendants, and after hearing objections by plaintiffs' counsel ruled on the defense instructions.

When all counsel had been given an opportunity to be heard on the requested instructions and objections, if any, thereto, the record shows the following:

BY THE COURT:

Do y'all need a few minutes to get your thoughts together, or are you ready to proceed?

BY MR. LAWSON:

We're ready, your Honor.

BY THE COURT:

Let's take about three minutes while I organize these instructions into some type of reasonable chronological order.

(RECESS)

BY THE COURT:

Let the record reflect that there have been numerous instructions withdrawn. Notation has been made thereon, and they will remain as a part of this file. Also, there have been requests for instructions on punitive damages. Those instructions have been refused since the Court is not of the opinion that this case warrants the giving of any instructions on punitive damage or any award thereon.

BY MR. BUFKIN:

Your Honor, the Court didn't mention our requested peremptory instructions. I assume those are all in the Court's hands and have been refused.

BY THE COURT:

Yes. In addition to those that have been withdrawn,

> there are numerous instructions that have been refused. And the Court has indicated that on the instruction itself, and they will not be a part of this record. We intend, or I am allowing counsel a total of two and a half hours in closing arguments....(emphasis added)

With this record background, the Nichols' complain on appeal that the circuit court "erroneously" refused jury instructions requested by them, and substituted "impermissibly abstract" instructions. They list "proposed" instructions P-1, P-2, P-3, P-4, P-5, P-6 and P-11. While these instructions which they complain were erroneously "refused" appear in the record, none is stamped as "filed,," and instruction P-4, P-5 and P-6 show they were withdrawn, and P-1, P-3 and P-11 are marked "refused."

The Nichols' counsel made no record whatever as to these instructions. Counsel did not mention them, or call any of them to the attention of the court during the hearing in chambers on the instructions. If there had been any confusion or oversight over the absence of any discussion of them in the record, counsel also had an opportunity to call them to the attention of the court in a motion for a new trial, request a hearing thereon, and make a proper record of precisely what occurred in reference to these instructions.

As this record shows, every single instruction requested by the plaintiffs on the record was granted, Appellate counsel asks us to speculate as to the others. This Court has no way of knowing what occurred in reference to them. It is of concern to this Court that counsel would ask us to surmise as to instructions which were never presented to the circuit court for a ruling on the record. It is in poor grace when experienced and able counsel are afforded an opportunity to make a clear and unambiguous trial record do not see fit to do so, yet claim some alleged error from an incomplete, ambiguous or uncertain record they were at least partly responsible in creating in the first instance. If counsel for any party wants a circuit judge to consider a proposed instruction, it is his duty to submit such instruction on the record, and have the court make a ruling thereon on the record. Any error predicated upon the granting or refusing of an instruction must come

from an instruction presented to the circuit court on the record, and a ruling thereon made on the record.

In *Wilson v. Johnson*, 493 So.2d 947, 950 (Miss. 1986), we held:

> This court simply refuses to review any allegation of error which is unsupported by the record. We have stated this upon innumerable occasions.
>
> Generally a court reporter is available there in court for a party to see that a proper record is made. In the event there is no court reporter, or the court reporter fails to make a proper record, or accurate record, the party can prepare a bill of exceptions. (Emphasis added)
>
> What we have said in this opinion about the necessity of making a record of any alleged error is a belabored repeat of the obvious. Because attorneys continue to allege in briefs facts on which a record is blank, we are constrained to once again make the point. If something happens in a trial court about which a party feels aggrieved, he will not be allowed to complain of it on appeal unless he gets it in the record.

Nor is this case, as counsel would have it, in which a party submitted an erroneous instruction which the court refused without reforming it, thereby leaving the jury uninstructed on a crucial legal issue. *Byrd v. McGill*, 478 So.2d 302 (Miss. 1985). In this case all plaintiffs' instructions requested on the record were granted and they fairly and fully instructed the jury on the legal issues from which the jury was to determine the facts.

Finding no error, we affirm.

AFFIRMED.

ROY NOBLE LEE, C.J., PRATHER, ROBERTSON, PITTMAN AND BANKS, JJ., CONCUR. SULLIVAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY McRAE, J., McRAE J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DAN LEE, P. J., AND SULLIVAN, J.

In The

Supreme Court of Mississippi

No. 89-CA-0590

FRANCES NICHOLS AND DAVID NICHOLS

V.

GRAYDEN TUBB, M.D., TOM McDONALD, M.D., AND NORTH MISSISSIPPI MEDICAL CENTER

SULLIVAN, JUSTICE, DISSENTING:

Under the authority of our decision in *McCullom v. Franklin*, _____ So. 2d _____ (No. 07-CA-59638, decided June 10, 1992, not yet reported), I would reverse and remand this case. I therefore dissent.

McRAE, J., JOINS THIS DISSENT.

In The

Supreme Court of Mississippi

No. 89-CA-590

FRANCES NICHOLS AND DAVID NICHOLS

V.

GRAYDEN TUBB, M.D., TOM McDONALD, M.D., AND NORTH MISSISSIPPI MEDICAL CENTER

McRAE, JUSTICE, DISSENTING:

Upon reading the record, it becomes apparent that most of the appellants' wounds are self-inflicted. The outcome of this case would undoubtedly have been far different had trial counsel been more vigilant. Accordingly, I join Justice Sullivan's dissenting opinion.

I would go further, however, and hold that the case should be reversed as to the defendant, McDonald, on grounds of properly preserved error. Dr. McDonald's initial answers to the plaintiffs' interrogatories, as the majority correctly notes, were woefully inadequate under our rules of civil procedure. McDonald never filed a valid supplementation, and the plaintiffs raised a timely objection at trial to McDonald's testimony concerning pertinent matters which McDonald's answers to interrogatories failed to address. The majority errs in holding that the plaintiffs waived McDonald's failure to file an appropriate response to interrogatories.

The plaintiffs propounded to Tom McDonald an interrogatory which requested the "substance of facts and opinions" concerning the testimony of his experts. McDonald's response stated that the experts, not he, would testify that McDonald's treatment "was in accordance with the applicable standard of care." Nowhere does the answer state

which standard of care the experts would apply; nor does it discuss the specifics of how, in the opinion of the potential experts, Dr. McDonald's treatment met the "applicable standard of care." Dr. McDonald's answer to the plaintiffs' interrogatory thus fell far short of the requirements of MRCP RULE 26 (b) (4) (A) (i) which requires the respondent to "state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." It is true that Dr. McDonald filed a supplemental response in January 4, 1988, which provided more specific answers to the plaintiffs' interrogatories, and also for the first time included himself as an expert. He can say that he just realized he was an expert on January 4, 1988. He and his attorney knew that he would give an expert opinion in this case from Day One. This supplemental response was ineffective, however, for three reasons: (1) it was untimely; (2) the court did not grant McDonald permission to file a tardy supplementation; and(3) it was unsworn.

MRCP Rule 26 (f) (2) states that "(a) party is under a duty seasonably to amend a prior response if he obtains information" which renders the initial response inadequate or where "a failure to amend the response is in substance a knowing concealment." "Seasonably" does not mean several months later. It means immediately. McDonald propounded his blatently inadequate answers to plaintiffs' interrogatories on August 27, 1986. Thus, well over one year passed before he filed a more detailed response. Clearly, McDonald's supplemental answers were unseasonable and therefore did not bring his discovery responses into compliance with Rule 26.

The majority finds that the plaintiffs waived McDonald's failure to file a seasonable supplemental answer when, at the pretrial conference, counsel for the plaintiff stated that he had "no objection" to allowing supplementation as late as the first of 1988. The majority neglects to note, however, that the trial court granted an extension of time to supplement only to Dr. Tubb(represented by attorney Bufkin and Dr. Willis (a defendant, represented by attorney Smith, who was subsequently dismissed from the suit). Dr. McDonald did not request an extension and was not granted one. He therfore had no authority or leave to file his untimely supplementary answers to interrogatories on January 4, 1988. To compound his error, he did not even submit his

attempted supplementary responses under oath as required by MRCP Rule 33 (a). Clearly, the answers Dr. McDonald filed on January 4, 1988 were absolutely invalid and to no avail. For our purposes in reviewing this case, we should treat them as if they did not even exist.

The majority also concludes that if the plaintiffs had wished to have more time after the January supplementations to prepare for trial, they should have moved for a continuance. This proposition is soundly defeated by *Huff v. Polk*, 408 So. 2d 1368 (Miss. 1982), wherein this Court held where a party files a tardy discovery response, the other party does not waive the discovery violation by failing to seek a continuance.

At trial, Dr. McDonald testified as an expert in his own behalf. While being examined by the Medical Center's counsel, he stated that Frances Nichol's injury resulted from an "infarct," or a closing down and blockage of blood vessels, and not from his treatment methods. Counsel for the plaintiffs interposed an objection:

> Your Honor please, excuse me, but we will object to any testimony now, regarding any infarct because there is nothing about an infarct or anything that they are talking about not anywhere in any of the hospital charts. Now, they are introducing a new cause of action I suppose, or cause of defense into this thing; there just isn't any evidence of it.

Articulate it is not, but there can be little doubt that this objection addresses defendant McDonald's failure to adequately divulge the substance of his proposed testimony in discovery. The trial court should have sustained the objection and instructed Dr. McDonald not to testify concerning facts not disclosed in his responses to the plaintiffs' discovery requests. The trial court's failure to do so constitutes reversable error. *Square D. Co. v. Edwards*, 419 So. 2 d 1227 (Miss. 1982) (allowing expert to testify to facts only generally referred to in pretrial discovery requires reversal).

I would reverse and remand as to the plaintiffs' action against Dr.

McDonald on grounds that the trial court should not have permitted McDonald to testify concerning facts not disclosed in response to plaintiffs' discovery requests. I would reverse and remand the entire case in accordance with *McCollum v. Franklin*, No. 07-CA-59638 (June 10, 1992) (not-yet-published opinion) as proposed by Justice Sullivan.

DAN LEE, P.J., and SULLIVAN, J., JOIN THIS OPINION.

Supreme Court, U.S.
FILED
JUN 11 1993
OFFICE OF THE CLERK

No. 92-1818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRANCES and DAVID NICHOLS,
Petitioners,

versus

GRAYDEN TUBB, M.D., TOM MCDONALD, M.D.
and
NORTH MISSISSIPPI MEDICAL CENTER,
Respondents.

Respondent North Mississippi Medical Center's Brief In Opposition To Petition For Writ of Certiorari to the Mississippi Supreme Court

---

BRIEF IN OPPOSITION

---

*L.F. SAMS, JR.
THOMAS D. MURRY
DONNA M. BARNES
MITCHELL, MCNUTT, THREADGILL,
SMITH & SAMS, P.A.
Attorneys at Law
Post Office Box 7120
Tupelo, Mississippi 38802-7120
(601) 842-3871

Attorneys for Respondent
North Mississippi Medical Center

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the first or fourteenth amendments to the United States Constitution requires that a trial court permit an attorney in any case unrestricted discretion to interview members of a jury panel post-verdict without judicial oversight or supervision.

TABLE OF CONTENTS

	Page
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	9
A. The Petition for Writ of Certiorari is Untimely	9
B. Federal Claims, Raised for First Time on Petition for Rehearing, Were Not "Specially Set Up or Claimed" and Provided Mississippi Supreme Court Adequate and Independent State Grounds for Denying Petition for Rehearing	11
C. The Petition for Writ of Certiorari is Without Merit	15
CONCLUSION	26

TABLE OF AUTHORITIES

Cases	Page
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	14
Big John, B.V. v. Indian Head Grain Co., 718 F.2d 143 (5th Cir. 1983)	16,20
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	10
Cox v. New Hampshire, 312 U.S. 569 (1941)	19
Elisovsky v. State, 592 P.2d 1221 (Alaska 1979), *modifying Irving v. Bullock*, 549 P.2d 1184 (Alaska 1976)	22
Forbes v. State Council of Virginia, 216 U.S. 396 (1910)	12
Gagliano v. Ford Motor Co., 551 F.Supp. 1077 (D.Kan. 1982)	16,18-20
Godchaux Co. v. Estopinal, 251 U.S. 179 (1919)	11
Haeberle v. Texas International Airlines, 739 F.2d 1019 (5th Cir. 1984)	21-22
Hanson v. Denckla, 357 U.S. 235 (1958)	12
Hathorn v. Lovorn, 457 U.S. 255 (1982)	13
Henry v. Mississippi, 379 U.S. 443 (1965)	12
Herndon v. Georgia, 295 U.S. 441 (1935)	12
Irving v. Bullock, 549 P.2d 1184 (Alaska 1976), *modified, Elisovsky v. State*, 592 P.2d 1221 (Alaska 1979)	22
Jackson v. Denno, 378 U.S. 368 (1964), *overruling on other grounds Stein v. New York*, 346 U.S. 156 (1953)	15
King v. United States, 576 F.2d 432 (2nd Cir.), *cert. denied*, 439 U.S. 850 (1978)	16,23
Konigsberg v. State Bar of California, 366 U.S. 36 (1961)	19
Lawson v. State, 573 So.2d 684 (Miss. 1990)	5

Table of Authorities Continued

	Page
Madruga v. Superior Court, 346 U.S. 556 (1954) .	10-11
Mahoney v. Vondergritt, 938 F.2d 1490 (1st Cir. 1991), *cert. denied*, 112 S.Ct. 1195 (1992)	23
Maldonado v. Missouri Pacific Railway Co., 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987)	20,23
McDonald v. Pless, 238 U.S. 264 (1915)	15,19,22
Michigan v. Tyler, 436 U.S. 499 (1978)	12
Miller v. United States, 403 F.2d 77 (2nd Cir. 1968), *modified on other grounds*, 411 F.2d 825 (1969)	17
Mississippi Power & Light Co. v. Moore, 487 U.S. 354 (1988)	10
Missouri v. Jenkins, 495 U.S. 33 (1990)	9
MST, Inc. v. Mississippi Chemical Corp., 610 So.2d 299 (Miss. 1992)	12-13
Neron v. Tierney, 841 F.2d 1197 (1st Cir.), *cert. denied*, 488 U.S. 832 (1988)	20,23-25
Nichols v. Tubb, 609 So.2d 377 (Miss. 1992)	2
O'Rear v. Fruehauf Corp., 554 F.2d 1304 (5th Cir. 1977)	16,23
Olberg v. Minneapolis Gas Co., 291 Minn. 334, 191 N.W.2d 418 (1971)	22
Pennsylvania v. Ritchie, 480 U.S. 39 (1987)	21
Remmer v. United States, 347 U.S. 227 (1954)	23
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945)	11-12
Smith v. Phillips, 455 U.S. 209 (1982)	23
Stein v. New York, 346 U.S. 156 (1953), *overruled on other grounds, Jackson v. Denno*, 378 U.S. 368 (1964)	15,22
Street v. New York, 394 U.S. 576 (1969)	14

Table of Authorities Continued

Page

Tanner v. United States, 483 U.S. 107 (1987) 15,19,22,26

Tasin v. Sifco Industries, Inc., 50 Ohio St.3d 102, 553 N.E.2d 257 (1990) 19

United States v. Abcasis, 811 F.Supp. 828 (E.D.N.Y. 1992) 23

United States v. Calbas, 821 F.2d 887 (2nd Cir. 1987), *cert. denied*, 485 U.S. 937 (1988) 17

United States v. Cuthel, 903 F.2d 1381 (11th Cir. 1990) 23

United States v. Gravely, 840 F.2d 1156 (4th Cir. 1988) 23

United States v. Griek, 920 F.2d 840 (11th Cir. 1991) 19-20

United States v. Hooshmand, 931 F.2d 725 (11th Cir. 1991) 20

United States v. Ianniello, 866 F.2d 540 (2nd Cir. 1989) 16,23

United States v. Moon, 718 F.2d 1210 (2nd Cir. 1983), *cert. denied*, 466 U.S. 971 (1984) 23-24

United States v. Moten, 582 F.2d 654 (2nd Cir. 1978) 17

United States v. Narciso, 446 F.Supp. 252 (E.D. Mich. 1977) 22

United States v. Parker, 549 F.2d 998 (5th Cir. 1977) 24

United States v. Riley, 544 F.2d 237 (5th Cir. 1976), *cert. denied*, 430 U.S. 932 (1977) 23-24

United States v. Sanchez, 380 F.Supp. 1260 (N.D. Tex. 1973), *aff'd*, 508 F.2d 388 (5th Cir.), *cert. denied*, 423 U.S. 827 (1975) 22

United States v. Yonn, 702 F.2d 1341 (11th Cir.), *cert. denied*, 464 U.S. 917 (1983) 23

Webb v. Webb, 451 U.S. 493 (1981) 11,14

Table of Authorities Continued

Page

Wilkerson v. Amco Corp., 703 F.2d 184 (5th Cir. 1983) 16,23

Constitutional Provisions

U.S. Const. amend. I i,9,12,14,18-20,22
U.S. Const. amend. VI 6,8
U.S. Const. amend. XIV i,9,12,14,18,20-21
U.S. Const. art. VI 5

Statutory Provisions

28 U.S.C. § 1257 2,9-11
28 U.S.C. § 2101 2,9
Fed. Rule of Appellate Procedure 40 13
Fed. Rule of Evidence 606(b) 6,18-20
Miss. Rule of Evidence 606(b) 6
Miss. Supreme Court Rule 21 2,7
Miss. Supreme Court Rule 40 9-10,13

Miscellaneous

Munford, Luther T., *Mississippi Supreme Court Practice* § 1.5 (1991) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1818

FRANCES and DAVID NICHOLS,

Petitioners,

versus

GRAYDEN TUBB, M.D., TOM MCDONALD, M.D.
and
NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

Respondent North Mississippi Medical Center[1] respectfully requests that this Court deny the Petition for Writ of Certiorari to review the Mississippi Supreme Court's Denial of Petition for Rehearing of Petition for Extraordinary Writ.

OPINIONS AND ORDERS BELOW

The June 7, 1988, order of the Circuit Court of Lee County, Mississippi, denying petitioners' *ex parte* motion to the court for leave to interview jurors is unreported and is substantially reproduced in the Petition for Writ of Certiorari at 9-10. The August 1, 1990, decision of the Mississippi Supreme Court denying petitioners' Statement of Facts treated as a

---

[1] North Mississippi Medical Center, Inc., is a Delaware not-for-profit corporation wholly owned by North Mississippi Health Services, Inc., a Delaware corporation. North Mississippi Medical Center, Inc., has no subsidiary companies.

Petition for Extraordinary Relief pursuant to Miss. Sup. Ct. Rule 21 is unreported and is reproduced in App. A, 1a-2a. The August 19, 1992, opinion of the Mississippi Supreme Court affirming the judgment of the Lee County Circuit Court on the direct appeal is reported at 609 So.2d 377 and is reproduced in the Supplemental Appendix. The December 31, 1992, order denying petitioners' petition for rehearing, granting petitioners' motions for leave to supplement petition for rehearing upon newly discovered information and for leave to further supplement petition for rehearing upon newly discovered information and denying respondents' motion to strike petition for rehearing and supplementations thereto is unreported and is substantially reproduced in the Petition for Writ of Certiorari at 10.

JURISDICTION

The United States Supreme Court has no jurisdiction under 28 U.S.C. § 1257 to review the subject decisions of the Mississippi Supreme Court. The Mississippi Supreme Court's decision respecting any issue of alleged improper extraneous influence upon the jury was final on August 1, 1990, and, therefore, the Petition for Writ of Certiorari is untimely under 28 U.S.C. § 2101(c). Additionally, the federal questions, raised for the first time on petition for rehearing, were not "specially set up or claimed" as required by 28 U.S.C. § 1257 and were presented in violation of Mississippi Supreme Court rules. The Mississippi Supreme Court, therefore, had adequate and independent state grounds for denying the petition for rehearing.

STATEMENT OF THE CASE

The petitioners' medical malpractice action against respondents Dr. Grayden Tubb, Dr. Thomas McDonald and North Mississippi Medical Center ("the Medical Center") was tried in the Circuit Court of Lee County, Mississippi. During an afternoon break on the seventh day of trial, January 27, 1988, a casual exchange took place between two nurses employed by respondent Medical Center and a male juror at the water fountain outside the courtroom in the presence of several other bystanders.[2] The incident was reported to the trial judge, and the juror was excused in order to avoid any appearance of impropriety. [R. 501-06; T. 1383-85].[3]

The trial continued with an alternate juror replacing the excused juror. [T. 1384]. Prior to the reading

---

[2] The male juror, Hankins, initiated conversation with one of the nurses, Hunter, by remarking on the temperature and the fact that he was thirsty. Hunter recognized him as the father of a boy who had played "T-ball" with her son many years ago. The second nurse, Harris, approached, and Hankins recalled coaching Harris's son in "T-ball" years previously. A light exchange followed until Sanders, an investigator employed by William S. Lawson, counsel for petitioners, approached the nurses and advised them that they should not speak to a juror even at the water fountain. The conversation, which involved no facts remotely related to the case, ceased almost immediately. [R. 501-06].

[3] In excusing the juror, the trial judge stated "I am of the opinion, having asked counsel for that Defendant to confer with them, that the conversation was completely innocent. I don't want to imply that there was any improper words said. . . . There, I don't think as I stated was any misconduct, but quite surely there is the appearance that the court is concerned with." [T. 1382-85]. Petitioners did not move for mistrial.

of the verdict, the trial judge read and entered an order prohibiting the parties, their counsel, and other persons from

> communicat[ing] with the jury or any member thereof regarding the verdict. Provided, however, that if any attorney believes in good faith that the verdict may be subject to legal challenge such attorney may apply *ex parte* to the Court for permission to interview one or more members of the jury regarding any fact or circumstance claimed to support such legal challenge. If satisfied that good cause exists, the Court may grant permission for the attorney to make the requested communication and shall prescribe the terms and conditions under which the same may be conducted.

[T. 2011-12; R. 596].[4]

The jury returned verdicts in favor of each of the respondents. [T. 2012-13]. Two days later, one of the petitioners' expert witnesses, Dr. William Gary, contacted alternate juror Denham and questioned her concerning the verdict. During their conversation, Denham allegedly asked Dr. Gary whether he knew petitioner Frances Nichols was receiving $7,000 from workers' compensation each month; Denham did not indicate how or when she gained any such informa-

---

[4] The court advised the jury that "this in no wise is intended to infringe upon your right of free speech. Feel free if you desire to communicate with anybody you want to communicate with. But I want you to initiate that communication and if you don't want to talk you don't have to. But if you want to, you are welcome to." [T. 2012].

tion.[5] Dr. Gary reported his conversation to Lawson. Lawson then telephoned alternate juror Denham and juror Stasko, falsely representing to them that he had the trial judge's permission to discuss the case with them. [Exhibit 1 to "Statement of the Facts" treated as Petition for Extraordinary Writ in the Mississippi Supreme Court (hereinafter referred to as "Petition for Extraordinary Writ"); R. 628, 631]. Alternate juror Denham refused to talk to Lawson without speaking with the trial judge first, and juror Stasko denied having any information concerning insurance benefits during the deliberations. Stasko stated that he did not learn of insurance benefits until after the jury verdict had been rendered. [R. 628-30, 632 and Exhibit 2 to Petition for Extraordinary Writ].[6]

Thereafter, petitioners filed an *ex parte* motion to interview jurors "before the court, individually, on such terms as the court prescribes." [R. 614-16]. On May 18, 1988, the trial court conducted a hearing on the motion. [T. 2018-51]. In addition to argument,[7]

---

[5] Petitioners allege that $7,000 per month was the amount not of workers' compensation benefits but of a joint pretrial settlement offer made by various physicians, including the respondent physicians, which petitioners refused. [Petition for Extraordinary Writ at 1].

[6] Lawson was subsequently convicted of constructive criminal contempt for violating of the trial court's order. That conviction was affirmed by the Mississippi Supreme Court. *See Lawson v. State*, 573 So.2d 684 (Miss. 1990) [App. B, 3a-10a]. No review was sought from this Court.

[7] Petitioners argued that if they were prohibited from communicating further with the jurors, there would be a "deprivation of a United States Constitution article six right, to wit: 'The right of every American citizen to have his case, criminal

the court considered transcripts of Lawson's improper (and surreptitiously recorded) telephone contacts with jurors Stasko and Denham, the affidavits of Sanders, Dr. Gary, and nurses Harris and Hunter. [R. 501-06; T. 2046-47]. On June 7, 1988, the trial court, citing Rule 606(b) of the Mississippi Rules of Evidence,[8] ruled that the evidence failed to establish "good cause to interview jurors with a reasonable expectancy of proving that extraneous prejudicial information was improperly brought to the jury's intention during the course of its deliberations". The court found that the transcripts "affirmatively reflect that neither [jurors Stasko and Denham] nor any of the other jurors who were involved in deliberations, received extraneous prejudicial information improperly brought to the jury's attention . . . during the course of the deliberations." The court denied petitioners' motion for leave to interview jurors. [R. 626-27, Petition for Writ of Certiorari at 9-10].

Petitioners filed their notice of appeal to the Mississippi Supreme Court on August 22, 1988, but did not raise in either the statement of issues or any brief on the direct appeal an issue of extraneous prejudicial information's being improperly brought to the jury's attention. [R. 944].

---

or civil, tried by an impartial jury.' " [T. 2030-31]. Petitioners later amended their argument to be premised upon the "sixth amendment, United States Constitution . . . to maintain the integrity of our jury system to keep jurors segregated." [T. 2039].

[8] Rule 606(b) of the Mississippi Rules of Evidence is practically identical to Rule 606(b) of the Federal Rules of Evidence, prohibiting inquiry into the mental processes of jurors but permitting juror testimony "on the question whether extraneous prejudicial information was improperly brought to the jury's attention." *Compare* Miss.R.Ev. 606(b) *with* Fed.R.Ev. 606(b).

After all of the briefs on direct appeal had been filed in the Mississippi Supreme Court, petitioners filed a document entitled "Statement of the Facts" which the court treated as a Petition for Extraordinary Writ pursuant to Rule 21 of the Mississippi Supreme Court Rules. Far from challenging the constitutionality of the trial court's order prohibiting juror contact, the Petition for Extraordinary Writ requested that the Mississippi Supreme Court consider two new affidavits petitioners had obtained[9] and grant petitioners a new trial or in the alternative, permission pursuant to the trial court's order to interview one or more members of the jury. [Petition for Extraordinary Writ at 5-8]. The affidavits did not support petitioners' claim that the jury was subjected to extraneous prejudicial influence. At most, the affidavits indicated that some jurors might have speculated among themselves that the petitioners were receiving medical benefits which were "obviously" being provided by some unidentified source of insurance. Neither affidavit indicated the alleged source of the supposed information regarding insurance coverage. [Exhibits 8 and 9 to Petition for Extraordinary Writ].[10]

---

[9] The two new affidavits, apparently obtained in continued willful violation of the trial court's order, were from juror Bates (the one juror who had voted to hold respondent Medical Center liable) and juror Hill (who had been excused for sleeping during the court proceedings). [*Compare* Exhibits 8 and 9 to Petition for Extraordinary Writ *with* T. 2015-16; 1678-80].

[10] If indeed the jury did engage in speculation about whether petitioners were receiving some insurance benefits, there is absolutely no suggestion from any affiant that such speculation originated from extraneous information provided to the jury. The jury did not have to go beyond the evidence presented by the

On August 1, 1990, the Mississippi Supreme Court denied the Petition for Extraordinary Writ without comment. [App. A, 1a-2a].

The Mississippi Supreme Court's opinion on the direct appeal, rendered August 19, 1992, did not address any issue of alleged improper extraneous influence upon the jury. [*See* Supplemental Appendix].[11] On September 8, 1992, petitioners filed a petition for rehearing requesting, *inter alia*, that the Mississippi Supreme Court "reconsider its ruling denying [petitioners'] Petition for Extraordinary Relief". Although the petition for rehearing claimed various violations "of the concept of a fair trial guaranteed by both the State and Federal constitutions," it did not challenge the authority of the trial court to issue an order restricting juror contact in the first instance. [Petition for Rehearing at 13, 19-23].

On October 5, 1992, petitioners filed a motion for leave to further supplement petition for rehearing upon newly discovered information and attempted to assert a constitutional argument based on the "Sixth Amendment guarantee of trial by jury requir[ing] a jury verdict to be based upon evidence produced at trial." [Motion for Leave to Further Supplement

---

petitioners themselves to observe that plaintiff had been receiving insurance benefits. [*See* T. 348; Exhibits P-2, P-4.] Additionally, the figure of $7,000 per month was presented to the jury by petitioners as the amount of petitioner Frances Nichols' continuing monthly medical expense. [T. 1087].

[11] The court stated there to be "only two issues raised on this appeal, the first being that reversible error was committed in allowing testimony that was not revealed in pretrial discovery . . . and the second being the erroneous refusal of instructions requested by the plaintiffs." [Supplemental Appendix at 9].

Petition for Rehearing at 8]. On October 9, 1992, petitioners filed a statement of further authorities in support of "proposition III" of their petition for rehearing, raising for the first time first and fourteenth amendment challenges to the trial court's order. [Appellants' Statement of Further Authorities in Support of "Proposition III" of their Petition for Rehearing" at 2-3].

Respondent Medical Center challenged the petition for rehearing and supplementations thereto as being unauthorized, untimely, excessive in length, interjecting issues not raised on direct appeal and for failure to specify any "point of law or fact that the [Mississippi Supreme] Court has allegedly overlooked or misapprehended" as required by Rule 40 of the Mississippi Rules of Supreme Court. [Motion to Strike Petition for Rehearing and Supplementations Thereto].

On December 31, 1992, the Mississippi Supreme Court, without comment, granted the petitioners' motions for leave to supplement their petition for rehearing, and to further supplement their petition for rehearing, but denied the petition itself. [Petition for Writ of Certiorari at 10].

REASONS FOR DENYING THE WRIT

A. *The Petition for Writ of Certiorari is Untimely*

Any petition for writ of certiorari must be filed within ninety (90) days after entry of the final judgment or decree. 28 U.S.C. §§ 1257(a), 2101(c). This time limit is mandatory and jurisdictional. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). In the instant case, no issue concerning alleged improper extraneous influence upon the jury was raised on the direct appeal,

but only by Petition for Extraordinary Writ. That petition was denied by the Mississippi Supreme Court on August 1, 1990;[12] the decision of the Mississippi Supreme Court regarding extraneous influence upon the jury was then final, and the issues pending on direct appeal (jury instructions and alleged discovery violations) could not remotely give rise to a federal question that would require review by this Court. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-80 (1975) (decision on federal issue final for purposes of section 1257 where federal issue will survive regardless of outcome of further state proceedings which could not remotely give rise to additional federal question); *see also Mississippi Power & Light Co. v. Moore*, 487 U.S. 354, 370 n.11 (1988) (critical federal question already answered by state supreme court and ripe for review although further proceedings to be held on remand); *Madruga v. Superior Court*, 346 U.S. 556,

---

[12] Petitioners did not file a timely petition for rehearing following denial of the extraordinary writ. Rule 40 of the Mississippi Supreme Court Rules requires that a petition for rehearing "be filed within fourteen (14) days after a decision is handed down on the merits of a case or on a motion". Miss.S.Ct.R. 40(a). Although Lawson acknowledged that the petition for rehearing should have been "promptly filed" following the August 1, 1990 dismissal, he alleged that he never received a copy. [Motion for Leave to Further Supplement Petition for Rehearing Upon Newly Discovered Information at 7]. The Mississippi Supreme Court's order and notice denying the petition disclosed, however, that both of the petitioners' counsel before the Mississippi Supreme Court (Lawson and Wayne Drinkwater) were recipients of the order with the addresses shown as provided to the court by counsel on the briefs for the direct appeal. Drinkwater, lead counsel for petitioners before the Mississippi Supreme Court, made no representation to the Mississippi Supreme Court that he did not receive the August 1, 1990 order.

557 n.1 (1954) (state supreme court judgment finally disposing of writ of prohibition is final judgment reviewable under section 1257). The Petition for Writ of Certiorari, filed over two years later, is untimely, and this Court is without jurisdiction.

B. *Federal Claims, Raised on Petition for Rehearing, Were Not "Specially Set Up or Claimed" and Provided Mississippi Supreme Court Adequate and Independent State Grounds for Denying Petition for Rehearing*

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). The federal right must have been "specially set up or claimed" in the court below. 28 U.S.C. § 1257. In *Godchaux Co. v. Estopinal*, 251 U.S. 179 (1919), this Court, citing the predecessor to § 1257, explained:

> [I]n order to give us jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must have been especially set up there at the proper time and in the proper manner; and, further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point.

251 U.S. at 181; *see also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945) (questions presented on petition for rehearing "come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior

to the original disposition"); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958) (question raised on petition for rehearing "not seasonably presented"); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (question raised on petition for rehearing "comes too late, unless the court actually entertains the question and decides it"). In *Forbes v. State Council of Virginia*, 216 U.S. 396 (1910), this Court, after reiterating the general rule, held that a state court's recitation of "mature consideration" of the petition for rehearing was insufficient to show that the federal question was "considered and passed upon". 216 U.S. at 399. In the instant case, no federal question was properly raised in the Mississippi Supreme Court. Petitioners' alleged first and fourteenth amendment rights to interview jurors without leave of court were not "specially set up or claimed" below, and this Court is without jurisdiction.

Additionally, "[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 513 n.7 (1978); *Henry v. Mississippi*, 379 U.S. 443, 447-48 (1965). In Mississippi, arguments not set forth as an issue in the original briefs of the parties are waived. *MST, Inc. v. Mississippi Chemical Corp.*, 610 So.2d 299, 305 (Miss. 1992). A party may not, therefore, raise a new issue on petition for rehearing. The Mississippi Supreme Court recently explained:

> The purpose of a petition for rehearing is not to allow counsel to add assignments of error which, for whatever reason, were not

> included in the appellant's original brief to this court. Judicial economy dictates that we consider only those assignments of error set forth in the original brief. The purpose of the petition for rehearing is to allow the parties to point out "the points of law or fact which in the opinion of the petitioner this Court has overlooked or misapprehended . . . ." Miss. Sup. Ct. Rules 40. We cannot misapprehend or overlook that which is not presented for our review.

MST, 610 So.2d at 304.[13]

In the instant case, petitioners' Petition for Extraordinary Writ before the Mississippi Supreme Court did not challenge the trial court's order prohibiting juror contact, but merely requested that the Mississippi Supreme Court accept additional evidence and overrule the trial court's discretionary ruling. No constitutional question was raised in the Petition for Extraordinary Writ. The petition for rehearing following the decision on direct appeal, some two years after

---

[13] The *MST* decision answers any question raised in *Hathorn v. Lovorn*, 457 U.S. 255, 263 & n.13 (1982), concerning Mississippi's continued prohibition against presentation of new issues in petitions for rehearing. Following *Hathorn*, the Mississippi Supreme Court adopted new rules of supreme court procedure to replace the prior rules which "had evolved haphazardly". In an "effort to foster uniformity between state and federal practice," the new rules follow the Federal Rules of Appellate Procedure in most respects. *See* Munford, Luther T., *Mississippi Supreme Court Practice*, § 1.5 (1991). Rule 40 of the Mississippi Rules of the Supreme Court respecting content of petitions for rehearing, explained in *MST*, is patterned after Rule 40 of the Federal Rules of Appellate Procedure. *See* Miss. S. Ct. R.40, at comment.

the denial of the Petition for Extraordinary Writ, raised only a general question regarding the constitutionality of the trial court proceedings.[14] It was only upon a third supplementation to the petition for rehearing that the petitioners, acknowledging the deficiency of the petition for rehearing, sought to invoke the protections of the first and fourteenth amendments to the United States Constitution and to challenge the trial court's authority to restrict post-verdict juror contact.

This Court "has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Webb*, 451 U.S. at 495-96 (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)). In the instant case, the specific constitutional provisions petitioners would invoke before this Court were not presented in the state court until supplementation to petition for rehearing, which occurred more than two years after the decision denying the Petition for Extraordinary Writ. The Mississippi Supreme Court is presumed to have denied the petition for rehearing due to the petitioners' failure to comply with state procedural rules governing timing and content of petition for rehearing. The denial of the petition for rehearing, therefore, rests upon adequate and independent state grounds and is not subject to review by this Court.

---

[14] *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) (party may not preserve constitutional challenge by generally invoking the constitution in state court).

C. *The Petition for Writ of Certiorari is Without Merit*

This Court has long recognized the necessity of shielding jurors from post-verdict harassment:

> [A]ll verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict.

McDonald v. Pless, 238 U.S. 264, 267 (1915); *see also Stein v. New York*, 346 U.S. 156, 178 (1953) *overruled on other grounds, Jackson v. Denno*, 378 U.S. 368, 391 (1964) (courts have not "favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them"). In *Tanner v. United States*, 483 U.S. 107 (1987), this Court stated, "There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." *Tanner*, 483 U.S. at 120.[15]

Lower federal courts have expanded upon the "evil consequences" which would result from post-verdict inquiries: "subjecting juries to harassment, inhibiting

---

[15] In *Tanner*, counsel had secured a juror affidavit in clear violation of the district court's order and local rule against juror interviews. This Court condemned the practice, stating that "on this basis alone the District Court would have been acting within its discretion in disregarding the affidavit." 483 U.S. at 126.

juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts." *See United States v. Ianniello*, 866 F.2d 540, 543 (2nd Cir. 1989); *see also King v. United States*, 576 F.2d 432, 438 (2nd Cir.), *cert. denied*, 439 U.S. 850 (1978); *Gagliano v. Ford Motor Co.*, 551 F.Supp. 1077, 1079 (D.Kan. 1982). Requiring a party

> to make a showing of likely misconduct before allowing such an inquiry: protect[s] the jury from post-verdict misconduct and the courts from time-consuming and futile proceedings; reduc[es] the "chances and temptations" for tampering with the jury; and increas[es] the certainty of civil verdicts. We continue to decline to "denigrate jury trials by afterwards ransacking the jurors in search of some ground . . . for a new trial" unless a preliminary showing is made.

Wilkerson v. Amco Corp., 703 F.2d 184, 185-86 (5th Cir. 1983) (quoting *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1310 & n.4 (5th Cir. 1977)) (citations omitted); *Big John, B.V. v. Indian Head Grain Co.*, 718 F.2d 143, 150 (5th Cir. 1983). The United States Court of Appeals for the Second Circuit has recognized:

> A serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have grievances against fellow jurors, would be led into imagining sinister happenings which simply did not occur or into saying things which, although inadmissible, would be included in motion papers and would

> serve only to decrease public confidence in verdicts.

United States v. Moten, 582 F.2d 654, 665 (2nd Cir. 1978). Lower courts have not only the power but also "the duty to supervise and closely control [post-verdict jury] inquiries." *United States v. Calbas*, 821 F.2d 887, 896 (2nd Cir. 1987), *cert. denied*, 485 U.S. 937 (1988); *Moten*, 582 F.2d at 665; *Miller v. United States*, 403 F.2d 77, 84 (2nd Cir. 1968), *modified on other grounds*, 411 F.2d 825 (1969).[16]

The instant case is a classic example of the necessity of judicial supervision and oversight of post-verdict jury inquiries. The two surreptitiously recorded telephone conversations between petitioners' counsel and jurors Stasko and Denham revealed that counsel lied to the jurors, attempted to play on their sympathy for petitioners, and attempted to twist the meaning of their statements when those statements did not confirm counsel's suppositions. [R. 631-37 and Exhibit 2 to Petition for Extraordinary Writ; App. B, 3a-10a]. Additionally, the only two affidavits counsel obtained were from two disgruntled jurors,

---

[16] Contrary to the assertions of petitioners that any state interest can be met by "simply . . . providing that counsel's questioning of the jury would be limited to matters of whether there was any extraneous matter brought to their attention", the United States Court of Appeals for the Second Circuit in *Miller*, recognized that "the line between proper and improper inquiry is not easy to draw" and suggested that the trial court "may well find it better that he control any questioning". 403 F.2d at 82. In the instant case, counsel's questioning of juror Stasko actually attempted to elicit the content of juror deliberations, and the affidavits of jurors Hill and Bates likewise purportedly reveal the content of juror discussion and deliberation.

one of whom had been dismissed for sleeping and the other who had been the only juror who voted in favor of the petitioners.

The amount of precious judicial resources which has been wasted on the unfounded juror issues is obvious. At the trial court hearing, counsel for petitioners revealed that he had tape recordings of his conversations with jurors Denham and Stasko. On reviewing these recordings, the trial court found no evidence sufficient to raise a *prima facie* case of improper extraneous influence before the jury. Juror Stasko stated that he had no knowledge of the alleged workers' compensation benefits until after the verdict had been rendered. The additional affidavits included with the Petition for Extraordinary Writ did nothing more than suggest that insurance had been discussed by the jurors, and none of the statements went beyond the evidence presented to the jury in the courtroom or what the jurors could observe every day at trial.

Local rules of court requiring a party and his counsel to show "just cause" as a precondition to post-verdict jury interviews do not violate the first or fourteenth amendments to the United States Constitution. In *Gagliano*, the United States District Court for the District of Kansas found the plaintiff's first amendment challenge to be "wholly conclusory and . . . not refer[ring] to authority for support." The court explained that a party's freedom to speak with jurors following trial "is already seriously limited by Federal Rule of Evidence 606(b). [The] local rule only places a 'just cause' precondition to conduct allowed

by this federal rule." The court explained that the local rule

> is nothing more than a general regulation of plaintiff's counsel's speech in a very narrow and limited context. It incidently limits counsel's speech, but is supported by a valid governmental interest, namely the interest in the orderly conduct of civil trials and the finality of verdicts, and is clearly outweighed by that interest. The rule does not violate the United States Constitution. *Konigsberg v. State Bar of California*, 366 U.S. 36 . . . (1961). It is no different in principle than a licensing requirement prior to speech [*Cox v. New Hampshire*, 312 U.S. 569 . . . (1941)]. . . .

551 F.Supp. at 1079 (brackets in original); *see also Tasin v. Sifco Industries, Inc.*, 50 Ohio St.3d 102, 553 N.E.2d 257, 263 (1990) (local rule prohibiting post-trial communication with jurors without leave of court "not an unconstitutional prior restraint on freedom of speech").

Likewise, two United States Courts of Appeal have upheld, against first amendment challenges, local rules prohibiting juror contact except by leave of court. In *United States v. Griek*, 920 F.2d 840 (11th Cir. 1991), the United States Court of Appeals for the Eleventh Circuit construed the local rule requirement of "good cause" in light of Federal Rule of Evidence 606(b) and held that "good cause under the local rule may be shown only by satisfying the requirements of the exception stated in the Federal Rule." Citing *Tanner, supra,* and *McDonald, supra,* the court of appeals held that any first amendment right was outweighed by the "compelling government interest" that a jury's deliberations not "be exposed to public view except by a showing of outside influence, the basis for the

exception in Rule 606(b)." 920 F.2d at 842-43; *see also United States v. Hooshmand*, 931 F.2d 725, 736-37 (11th Cir. 1991) (upholding against first amendment challenge local rule prohibiting juror contact except upon showing of good cause). In *Big John*, the United States Court of Appeals for the Fifth Circuit found the first amendment challenge to the local rule prohibiting juror contact except upon the explicit leave of court to "ha[ve] no merit." 718 F.2d at 149.

In *Neron v. Tierney*, 841 F.2d 1197 (1st Cir.), *cert. denied*, 488 U.S. 832 (1988), the United States Court of Appeals for the First Circuit held that a procedural scheme requiring a party to make a satisfactory threshold showing of substantiality before invading the jury's privacy "cannot be said to be so harsh as to offend the Constitution" and upheld the state procedure against due process challenge. 841 F.2d at 1200-01. Likewise, in *Gagliano, supra*, the United States District Court for the District of Kansas upheld the local rule requiring "just cause" as a precondition to juror interviews as against a due process challenge. The court found that "the present procedure of requiring a motion, with supporting argument, by the party seeking to interview the jurors, and requiring argument in opposition provide all the process that is due". 551 F.Supp. at 1080; *see also Maldonado v. Missouri Pacific Railway Co.*, 798 F.2d 764, 770 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) (upholding Federal Rule of Evidence 606(b) against due process challenge; "defendant's right to a fair trial is not absolute; it may be outweighed by other considerations, including the jury's right to privacy and protection from harassment").

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), a father accused of sexual abuse of his minor daughter subpoenaed the records of the state child welfare agency concerning his daughter. The agency refused to comply with the subpoena, claiming the records to be privileged under state law. 480 U.S. at 43. The Supreme Court of Pennsylvania determined that the father, through his attorney, was entitled to review the entire file to search for any useful evidence with " 'the eyes and the perspective of an advocate,' who may see relevance in places that a neutral judge would not." 480 U.S. at 46. On writ of certiorari, this Court reversed, holding such disclosure not required by the due process clause. The Court stated that "[a]lthough the eye of an advocate may be helpful to a defendant in ferreting out information, this Court has never held—even in the absence of a statute restricting disclosure—that a defendant alone may make the determination as to the materiality of the information." 480 U.S. at 59 (citations omitted). The Court held that the father's interest "in ensuring a fair trial can be protected fully by requiring that the [agency's] files be submitted only to the trial court for in camera review." 480 U.S. at 60.

In the instant case, petitioners would have this Court declare a constitutionally protected right of litigants to conduct unbridled post-verdict juror interviews.[17] As in *Ritchie*, petitioners would have jury

---

[17] The cases cited by petitioners as purportedly evidencing a conflict among the lower courts as to when post-verdict juror contact is appropriate do not support their argument in favor of constitutional entitlement to interview jurors in any case. *See Haeberle v. Texas International Airlines*, 739 F.2d 1019, 1021-22 (5th Cir. 1984) (appellate court uniformly refuses to overturn

interviews conducted with "the perspective of the advocate" rather than with the protections of judicial oversight. The danger to the jury system inherent in such conduct has been long recognized by this Court. *See Tanner, Stein* and *McDonald, supra.*

The Petition for Writ of Certiorari raises only a challenge to the trial court's authority to condition post-verdict interviews of jurors upon a showing of good cause. To the extent, however, petitioners' argument implies some unarticulated inadequacy in the

---

denial of leave to interview jurors for purpose of obtaining evidence of impropriety in deliberations unless specific evidence of misconduct shown; distinguishing first amendment interests in flow of information from jurors to public); *United States v. Narciso*, 446 F.Supp. 252, 324-25 (E.D. Mich. 1977) (American Bar Association's rulings on ethical considerations concerning post-verdict juror contact "somewhat ambiguous"—"the law" not ambiguous as asserted by petitioners; trial court deemed its failure to prohibit post-verdict juror contact "perhaps short sighted" and condemned the conduct of government in conducting post-trial inquiry as "extremely ill-advised" and "imprudent"); *United States v. Sanchez*, 380 F.Supp. 1260, 1265-66 (N.D. Tex. 1973) *aff'd*, 508 F.2d 388 (5th Cir.), *cert. denied*, 423 U.S. 827 (1975) ("disgusting practice of unbridled interrogation of jurors" not permitted; jurors allowed to be interviewed in non-harassing manner "where good cause appears"; no implication that counsel is to determine existence of good cause); *Irving v. Bullock*, 549 P.2d 1184, 1188 n.9 (Alaska 1976), *modified, Elisovsky v. State*, 592 P.2d 1221 (Alaska 1979) (trial court expressly gave attorneys permission to speak with jurors after trial; no implication that permission was based upon constitutional right); *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 191 N.W.2d 418, 424-25 (1971) (although trial court should be "liberal" in granting hearing with respect to juror misconduct, attorney should not be allowed to contact jurors in an effort to obtain information upon which to base motion for hearing).

trial court hearing[18] or attempts to challenge the correctness of the trial court's determination that good cause had not been shown in the instant case, such contentions are clearly without foundation. Although a court must satisfactorily probe nonfrivolous charges of jury spoilage (*see Smith v. Phillips*, 455 U.S. 209, 218 (1982); *Remmer v. United States*, 347 U.S. 227, 230 (1954); *Mahoney v. Vondergritt*, 938 F.2d 1490, 1493 (1st Cir. 1991), *cert. denied*, 112 S.Ct. 1195 (1992); *Neron*, 841 F.2d at 1201), the trial court has broad discretion in determining how to investigate an allegation of juror misconduct. *See, e.g., United States v. Cuthel*, 903 F.2d 1381, 1382 (11th Cir. 1990); *United States v. Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988); *Maldonado*, 798 F.2d at 769; *United States v. Moon*, 718 F.2d 1210, 1235 (2nd Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); *United States v. Yonn*, 702 F.2d 1341, 1344-45 (11th Cir.), *cert. denied*, 464 U.S. 917 (1983). A post-verdict interrogation of the jury requires that the requesting party show "clear, strong, substantial and incontrovertible evidence . . . that a specific, non-speculative impropriety has occurred". *Moon*, 718 F.2d at 1234; *see Cuthel*, 903 F.2d at 1383 (quoting *Moon*); *Ianniello*, 866 F.2d at 543 (quoting *Moon*); *King*, 576 F.2d at 438; *United States v. Abcasis*, 811 F.Supp. 828, 835-36 (E.D.N.Y. 1992) (quoting *Moon*); *cf. Gravely*, 840 F.2d at 1159 (requesting party must make threshold showing of improper outside influence); *Wilkerson*, 703 F.2d at 185 (moving party must show "specific instances of misconduct" before post-verdict jury inquiry will be allowed (quoting *O'Rear*, 554 F.2d at 1309-10); *United States v. Riley*, 544 F.2d

---

[18] The adequacy of the trial court hearing has never been properly challenged below.

237, 242 (5th Cir. 1976), *cert. denied*, 430 U.S. 932 (1977) (specific instances of misconduct must be shown).

When in the course of the trial court's investigation it becomes apparent that reasonable grounds to suspect impropriety do not exist, the inquiry should end. *Neron*, 841 F.2d at 1202; *Moon*, 718 F.2d at 1234; *United States v. Parker*, 549 F.2d 998, 1000 (5th Cir. 1977). In *Neron*, the United States Court of Appeals for the Second Circuit commended the trial court for holding a prompt evidentiary hearing "[d]espite the obviously speculative quality of the claim". The trial court, however, was justified in concluding the investigation when that presentation "failed to disclose the slightest bit of meat on the skeleton." The court of appeals stated:

> We have found no case which purports to lay down an ironclad rule necessitating posttrial interrogation upon demand of every juror in every circumstance. The Constitution, as we read it, imposes no such across-the-board requirement. . . . [T]here are situations where the evidence of impropriety may be so slight or conjectural as not to support any reasonable inference of prejudicial bias or misconduct. At this extremity . . . interviewing the juror will not significantly decrease the risk of error. . . . The need for post-verdict interviewing is dubious at best, and ultimately depends on the nature and weight of the independent evidence underbracing the claim and on the trial justice's sound discretion.

841 F.2d at 1202-03. The court held that the requesting party was "obliged to make a more cogent

showing before it became constitutionally imperative to recall [a] juror." The court stated that the "petitioner's asseveration, when unrolled, embodied evidence so sparse, a pyramiding of inferences so fragile, a thesis so speculative, as to envelop the bias/misconduct charge in a miasma of doubt. Asthenic to begin with, petitioner's claim was weakened rather than strengthened by his presentation at the hearing." 841 F.2d at 1203.

Likewise, in the instant case, petitioners have never presented anything but conjecture, speculation and surmise to support their allegation of misconduct. As in *Neron*, their "pyramiding of inferences" is indeed "fragile." Petitioners speculate that the two off-duty nurses, employed by respondent Medical Center, somehow learned of the content of supposed confidential settlement negotiations between petitioners and respondent physicians, and, during the course of the short, casual water fountain conversation in the presence of others, managed to convey the substance of the supposed settlement offer to juror Hankins as the amount of workers' compensation benefits being received. Juror Hankins in turn, petitioners surmise, informed fellow jurors of this compensation prior to his being excused from the jury. At the trial court hearing, the court was apprised that counsel for petitioners had actually tape recorded the telephone conversations on which petitioners' motion to interview jurors was based. Upon hearing juror Stasko dispute petitioners' contentions, the trial court reasonably determined there to be no evidence of extraneous influence so as to justify further post-verdict investigation either by court or by counsel. The trial court afforded petitioners sufficient hearing and did

not abuse its discretion in determining that "just cause" had not been shown.

CONCLUSION

Petitioners would have this Court set counsel loose upon jurors whenever counsel, in his sole discretion, determines "just cause" to be present; "[i]t is not at all clear . . . that the jury system could survive". *Tanner, supra.* The Petition for Writ of Certiorari is without merit, and, even if this Court had jurisdiction to consider the petition, and it is respectfully submitted that the Court does not, the Petition for Writ of Certiorari should be denied.

DATED: June 11, 1993.

Respectfully submitted,

*L.F. SAMS, JR.
THOMAS D. MURRY
DONNA M. BARNES
MITCHELL, MCNUTT, THREADGILL, SMITH & SAMS, P.A.
Attorneys At Law
Post Office Box 7120
Tupelo, Mississippi 38802-7120
(601) 842-3871
Attorneys for Respondent North Mississippi Medical Center

**Counsel of Record*

APPENDIX

APPENDIX A

Supreme Court of Mississippi
Linda Stone, Clerk
Third Floor Gartin Building
450 High Street
P.O. Box 249
Jackson, Mississippi 39205-0249

DEPUTY CLERKS
YVONNE BURNHAM
KATHY GILLIS

TELEPHONE:
601/359-3694
FAX: 601/359-2407

August 1, 1990

W. Wayne Drinkwater Jr.
BUTLER SNOW FIRM
P O Box 22567
Jackson MS 392252567

William S. Lawson
Attorney at Law
P O Box 848
Tupelo MS 388020848

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 1st Day of August, 1990.

Supreme Court Case #89-CA-0590

Trial Court Case #19993

Frances Nichols and David Nichols
vs.
Grayden Tubb, M.D., Tom McDonald, M.D., and North Mississippi Medical Center

Frances and David Nichols' Statement of the Facts Treated as a Petition for Extraordinary Relief Pursuant to Miss. Sup. Ct. Rule 21, and as Such, Denied.

Frances and David Nichols' Motion for an Expedited Appeal and for Advancement of This Cause on the Court's Calendar Denied.

Supreme Court Clerk

lwp

ccs: Cary Egbert Bufkin
Dudley Collier Graham
Robert Kimmons Upchurch
Thomas Wicker
Lucius Featherston (Sandy) Sams J
Fred M. Bush Jr.

APPENDIX B

Supreme Court of Mississippi

No. 07-KA-59378

Supreme Court of Mississippi.

Dec. 12, 1990.

Rehearing Denied Feb. 6, 1991

The Circuit Court, Lee County, Elzy J. Smith, J., found attorney in criminal contempt. Attorney appealed. The Supreme Court, Roy Noble Lee, C.J., held that evidence supported conviction of attorney for violating court order prohibiting postverdict communication with members of the jury.

Affirmed.

Thomas J. Lowe, Jr., Jackson, for appellant.

Mike C. Moore, Atty. Gen., Deirdre McCrory, Sp. Asst. Atty. Gen., Jackson, for appellee.

Before ROY NOBLE LEE, C.J., and ROBERTSON and SULLIVAN, J.

ROY NOBLE LEE, Chief Justice, for the Court:

William Lawson, a Tupelo attorney, was found guilty of constructive criminal contempt by the Lee County Circuit Court, Honorable Elzy J. Smith, presiding, and was sentenced to pay a fine of two hundred and fifty dollars and to serve a term of ten days in the Lee County Jail. The jail sentence was suspended. Lawson appeals from the judgment, contending that the Lee County Circuit Court erred in holding him in criminal contempt and assigns the following issue for this Court to decide:

EVIDENCE OF HIS GUILT WAS NOT SHOWN TO BE BEYOND A REASONABLE DOUBT.

FACTS

Appellant, a licensed attorney at law, tried an important medical malpractice case, styled *Frances and David Nichols v. Tubb et al.*, in the Lee County Circuit Court. The trial began on January 19, 1988, and concluded on February 4, 1988. Apparently, the courtroom atmosphere was charged with emotion, since it was rumored that the defendants had offered on two occasions to settle the suit for in excess of 1.5 million dollars, which was not accepted by the plaintiffs. On February 4, in the absence of the jury but in the presence of Lawson and other attorneys in the case, the trial judge, Honorable Frank Russell, read and entered an order governing the conduct of attorneys, parties and other persons in the courtroom upon, and after, return of the jury's verdict.[1]

---

[1] ORDER REFERENCE CONDUCT IN COURTROOM UPON RETURN OF JURY VERDICT AND QUESTIONING OF JURORS

The jury in this case having indicated to the Court it is prepared to return to the courtroom for the purpose of reporting as to its verdict in this case.

IT IS ORDERED AND ADJUDGED as follows:

1. Upon the return of a verdict by the jury in any civil or criminal action, neither the attorneys in the action, the parties, nor any other person in the courtroom or else where shall express to the members of the jury their pleasure or displeasure with the verdict.

2. After the jury has been discharged, neither the attorneys in the action, the parties, nor any other person shall at any time or in a manner communicate with the jury or any member thereof regarding the verdict.

Provided, however, that if any attorney believes in good faith that the verdict may be subject to legal challenge, such attorney may apply ex parte to the trial judge for permission to interview one or more members of the jury regarding any fact or circumstance claimed to

Subsequent to reading the order, Judge Russell brought the jury into the courtroom and the jury presented its verdict for the defendants. Judge Russell advised the jury that the mentioned order had been entered and that it prohibited the attorneys and parties of the case from initiating any conversation with members of the jury.

On the Saturday immediately following the trial, Dr. Gary, a witness in the trial, who had been discharged prior to the time that the aforementioned order had been read, and who had no knowledge of the same, telephoned Mrs. Denham, an alternate juror in the case. Denham had been a long time friend of Dr. Gary and Gary, concerned with the jury verdict, questioned Denham about such verdict. During their conversation Denham made mention of the fact that she had knowledge that the plaintiff in the trial had been receiving seven thousand dollars a month from workmen's compensation. Gary, concerned that Denham was privy to information which was not properly put into evidence before the jury, called Lawson the next day, Sunday, and advised him of his conversation with Denham.

Lawson initially attempted to call Judge Russell to relate to him the Gary/Denham discussion. Although Lawson made several attempts to contact Judge Russell, he was unable to do so. Lawson then called Denham. Denham refused to give Lawson any information asserting that she would not talk to Lawson without first gaining Judge Russell's permission to do so.

Shortly after Lawson's conversation with Denham, Lawson then called Chester Stasko, a juror in the case. Stasko related to Lawson that he had become aware of the workers compensation payments to the plaintiff the evening after the jury verdict had been given.

---

support such legal challenge. If satisfied that good cause exists, such judge may grant permission for the attorney to make the requested communication and shall prescribe the terms and conditions under which the same may be conducted.

The following Monday morning, Lawson went to Judge Russell's office to relate to Russell what had transpired between himself and the jurors. Russell showed Lawson a copy of his order which had prohibited communication with the jurors absent obtaining prior court approval. At this time Lawson immediately informed Judge Russell that he had taped the conversations between himself and the jurors.

Criminal Contempt proceedings were begun against Lawson in the Lee County Circuit Court before Judge Elzy J. Smith sitting specially.[2] Lawson asserted that although he was present at the time Judge Russell's order had been read, that due to a hearing deficiency he was unable to comprehend the same. Judge Smith found Lawson guilty of constructive criminal contempt and fined Lawson two hundred and fifty dollars. In addition to such fine, Judge Smith also sentenced Lawson to serve ten days in the Lee County Jail. Judge Smith suspended the jail sentence due to the many apologies made to the court by Lawson and due to the fact that Lawson provided the court with tapes of the prohibited conversations.[3]

LAW

Criminal contempt is conduct which is directed against the dignity and authority of the court or the judge acting judicially. *Cook v. State,* 483 So.2d 371 (Miss. 1986). "It arises from an act obstructing the administration of justice which tends to bring the court into disrepute or disrespect." *Id.* at 374. In essence the offense occurs when a defendant wilfully, maliciously and contumaciously refuses

---

[2] Judge Smith is a circuit judge for the Eleventh Circuit Court District of Clarksdale Mississippi.

[3] Lawson, unbeknownst to jurors Denham and Stasko, taped all of the conversation he had with Denham and taped most of the conversation he had with Stasko.

to comply with a decree of the court. *Cook v. State, supra; Langford v. Langford,* 253 Miss. 483, 176 So.2d 266 (1965).

In the case at bar, Lawson was convicted of constructive criminal contempt which occurred outside the presence of the court. Constructive contempt is "an act calculated to impede or embarrass, obstruct, defeat, or corrupt administration of courts of justice when the act is done beyond the presence of the court." *Coleman v. State,* 482 So.2d 221, 222 (Miss. 1986) (quoting *Knox v. State,* 160 Miss 494, 497, 135 So. 206, 207 (1931)). This court proceeds *ab initio* in criminal contempt proceedings and it is the Supreme Court's responsibility to determine on the record whether the defendant is guilty of the offense, not whether the lower court judge was manifestly wrong in his finding. *Cook,* 483 So.2d at 374. The burden of proof is on the state and the state must prove each element of criminal contempt beyond a reasonable doubt. Miss. Code Ann. § 11-51-11(4) (Supp. 1990).

Lawson asserts that the state has failed to prove beyond a reasonable doubt that he is guilty of constructive criminal contempt. The substance of Judge Russell's order had been twice read in the presence of Lawson, once prior to the jury being brought in and once in the jury's presence. Lawson does not dispute that the order was read but rather asserts that he did not comprehend the order. Lawson submits that he has a slight hearing disability which makes comprehension of the spoken word difficult. Lawson also suggests that compounding his hearing disability was the fatigue he was experiencing as the result of such a long and hard fought trial. Lawson states that Judge Russell's order was unusual in that it required prior court permission to contact jurors and that Lawson had never heard such an order before.

While Lawson asserts that he did not comprehend Judge Russell's order his actions suggest otherwise. Lawson, upon learning from Dr. Gary that Mrs. Denham may have had

improper information, attempted to contact Judge Russell on several occasions.[4] Sometime on that Sunday afternoon, after some of the unsuccessful calls to Judge Russell were made, Lawson called alternate juror Mrs. Denham.

> Lawson: I Know you are probably tired of looking at me, but we were mighty close together for the last three weeks. Do you remember the judge?
>
> Denham: Yeah.
>
> Lawson: You know, he told me to check with some of the jurors. And there are just one or two questions that I need to ask you.
>
> Denham: Do you mind if I call the judge and ask him?
>
> Lawson: Yeah. I have got his number would you like to?
>
> Denham: Yeah. I would like to call him and ask him if he gave you permission to call and ask me questions.
>
> Lawson: Oh, yes. Do you remember when you were standing there and, you know, he said two things. One he didn't want any demonstrations, you know, any outburst. And second, he said he would allow—I didn't know what counselor he was talking about because we didn't know the verdicts yet, you know. And see, you weren't a juror.
>
> Denham: That's right I wasn't.
>
> Lawson: You were an alternate.
>
> Denham: Uh-huh.

---

[4] Lawson attempted to reach Judge Russell at his home at 12:58 p.m.. Lawson learned that the judge was not home and that he may be at his cabin. Lawson then made several other attempts to reach the judge at his cabin and office at 2:59, 3:00, 4:41, 8:42, and 8:55 p.m.

> Lawson: And he, you know, said he would give us permission to either subpoena some witness back into court or find out, you know, if it is agreeable with them, you know, what happened.
>
> Denham: Well, I am going to have to talk to him first.

Although Lawson asserts he was unaware of the substance of Judge Russell's order prohibiting communications with jurors, Lawson stated to Denham "You know, he told me to check with some of the jurors" even though Judge Russell never told Lawson anything of the kind. When Denham refused to talk with Lawson, since she was of the opinion that she needed Judge Russell's permission as a prerequisite, Lawson attempted to get Denham to talk with him by reminding her that she was not a juror but rather she was an alternate juror. When Denham asked Lawson for Judge Russell's phone number Lawson attempted to change the subject of the conversation, even though Lawson must have had Judge Russell's phone number handy since Lawson had been trying to call Judge Russell all day. Instead of conveying Judge Russell's phone number to Denham, as she requested, Lawson told her that he would put her in touch with the judge.

When Denham refused to talk to Lawson, he then called Stasko, another juror. Although Lawson asserts that he did not comprehend Russell's order he stated to Stasko:

> Lawson: And listen, you know what the judge said there at the end when the verdicts were read?
>
> Stasko: Uh-huh.
>
> Lawson: He said that counsel would be permitted to call, you know,. And now you don't have to say one thing to me if you don't want to.

We are of the opinion that the state has proved beyond a reasonable doubt that Lawson willfully, and contuma-

ciously violated Judge Russell's order and committed constructive criminal contempt. Judge Russell testified that the order he read was one he used frequently and that he has heard orders similar in content read on several occasions. Lawson admits to being present in the court room where Judge Russell read the order once with the jury out and then subsequently conveyed the relevant parts to the jury, with counsel present, when the jury was in. Notwithstanding the order, when unable to contact Judge Russell, Lawson contacted two jurors and attempted to have them discuss items relevant to the case with him, by pretending to have authority to contact such jurors from Judge Russell.

The judgment of the lower court is affirmed.

SENTENCE OF CONTEMPT OF COURT AND PAY A FINE OF $250.00 AND SERVE TEN DAYS IN THE LEE COUNTY JAIL, TEN DAYS SUSPENDED UPON PAYMENT OF FINE AND COURT COSTS AFFIRMED.

HAWKINS, P.J., DAN M. LEE, P.J., and PRATHER, ROBERTSON, SULLIVAN, PITTMAN and BLASS, JJ., concur.

ANDERSON, J., not participating.

Supreme Court, U.S.
FILED
JUN 30 1993
OFFICE OF THE CLERK

No. 92-1818

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANCES NICHOLS and DAVID NICHOLS

Petitioners

VERSUS

GRAYDEN TUBB, M.D., TOM MCDONALD, M.D. and NORTH MISSISSIPPI MEDICAL CENTER,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT GRAYDEN TUBB, M.D.

BRIEF IN OPPOSITION

---

*CARY E. BUFKIN
D. COLLIER GRAHAM
SHELL BUFORD BUFKIN
CALLICUTT & PERRY
920 TRUSTMARK BUILDING
P.O. BOX 157
JACKSON, MS 39205-0157

Attorneys for Respondent
Grayden Tubb, M.D.
*Counsel of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the first or fourteenth amendments to The United States Constitution requires the unrestricted ability to interview jurors post-verdict even in the absence of a threshold showing of good cause to believe that the jury was subjected to extraneous information.

TABLE OF CONTENTS

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

A. The Petition for Writ of Certiorari is untimely 6

B. The Petition for Writ of Certiorari is without merit. 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases	Page
Big John B.V. v. Indian Head Grain Co. 718 F2d 143, 150 (5th Cir. 1983)	10
Bolton v. Tesoro Petroleum Corp. 871 F2d 1266 (5th cir.), *cert den* 493 US 823, 107 L Ed. 2d 49, 110 S. Ct. 83 (1989)	9
Continental Cas. Co. v. Howard 775 F2d 876, 886 (7th cir. 1985) *cert den.* 475 US 1122, 90 L Ed. 2d 186, 106 S. Ct. 1641 (1985)	10
O'Rear v. Fruehauf Corp. 554 Fed. 1304, 1309-10 (5th Circuit 1976)	9
Pan American Petroleum Corp. v. Pate 128 So 870 (Miss. 1930)	9
Planters Wholesale Grocery v. Kincade 50 So2d 57 (Miss. 1951)	9
Salter v. Watkins, 513 So2d 569, 571 n.l. (Miss. 1987)	8
Smith v. Phillips, 455 US 209, 71 L Ed. 2d 78, 102 S.Ct. 940 (1982)	7
Tanner v. United States 483 US 107, 97 L Ed. 2d 90, 107 S.Ct. 2739 (1987)	8
United States v. Bruscino 687 F2d 938, 941 (7th Cir. 1902) cert den 459 US 1211, 75 L Ed. 2d 446, 103 S. Ct. 1205	10
United States v. Gravely 840 F2d 1156, 1159 (4th Cir. 1988)	10

TABLE OF AUTHORITES CONTINUED

Cases **Page**

Statutory Provisions

28 USC § 1257 3

28 USC § 2101 (c) 3

Federal Rule of Evidence 606(b) 8

Mississippi Rules of Evidence 606(b) . . . 8

Mississippi Supreme Court Rule 21,40 . . 2,3

Rules of the Supreme Court of the United States

- Rule 10 7
- Rule 14.1 (e) (i) & (ii) 2
- Rule 14.1 (h) 6

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 92-1818

FRANCES NICHOLS and DAVID NICHOLS

Petitioners

VERSUS

GRAYDEN TUBB, M.D., TOM MCDONALD, M.D. and NORTH MISSISSIPPI MEDICAL CENTER,

Respondents

Respondent Grayden Tubb, M.D. respectfully requests that this Court deny the Petition for Writ of Certiorari to review the decision of the Mississippi Supreme Court denying petitioner's Motion for Extraordinary Relief and Motion for Rehearing thereof.

OPINIONS AND ORDERS BELOW

Petitioners neglect to cite the August 1, 1990 decision of the Mississippi Supreme Court denying petitioners' "Statement of Facts", treated as a Petition for Extraordinary Relief pursuant to Mississippi Supreme Court Rule 21. The decision is unreported and is reproduced in

App. A, 1a-2a attached to Respondent North Mississippi Medical Center's Brief in Opposition to the Petition for Writ of Certiorari.

JURISDICTION

The Petition for Writ of Certiorari herein wholly fails to provide a jurisdictional statement showing the dates of the judgment or decree sought to be reviewed in accordance with Rule 14.1 (e) (i) & (ii), Rules of the Supreme Court of the United States. A chronology of the dates of the judgments, orders and opinions involved herein reveals that this court has no jurisdiction under 28 USC § 1257 to review any decision of the Mississippi Supreme Court for constitutional infirmities.

Petitioners now complain that their inability to interview jurors in furtherance of their motion for a new trial violated their constitutional rights of free speech and due process under the first and fourteenth amendments, respectively. However, in their

direct appeal to the Mississippi Supreme Court of the adverse jury verdict petitioners did not raise any issue of extraneous influence on the jury or the trial court's denial of their motion to interview jurors. Rather, after briefing of the direct appeal was completed and the case was submitted to the Mississippi Supreme Court for decision, petitioners raised the claim of alleged extraneous influence on the jury and asserted error by the trial court in not permitting further juror interviews by way of a filing with the Mississippi Supreme Court on 22 November 1989 which was treated as a Petition for Extraordinary Relief, under Rule 21, Mississippi Supreme Court Rules. Even in this filing petitioners did not raise the instant speech and due process claims under the first and fourteenth amendments. The Mississippi Supreme Court denied relief on this petition on August 1, 1990 and petitioners did not seek a timely rehearing pursuant to Rule 40, Mississippi Supreme Court Rules. On August 19,

1992 the Mississippi Supreme Court issued its decision on the direct appeal affirming the judgment of the Circuit Court of Lee County, Mississippi. Thereafter, petitioners sought a rehearing of the decision and in a supplement raised for the first time the federal claims upon which review is now sought. The Mississippi Supreme Court denied rehearing on December 31, 1992.

The decision of the Mississippi Supreme Court regarding any issue of extraneous influence on the jury or the petitioners ability to interview jurors was final August 1, 1990. Hence, the instant Petition for Writ of Certiorari is untimely under 28 USC § 2101 (c). Furthermore, untimely raising the federal constitutional claims for the first time on petition for rehearing did not preserve the claims under 28 USC § 1257.

STATEMENT OF THE CASE

Respondent Dr. Tubb respectfully disputes

the accuracy of the Statement of the Case set forth by petitioners herein. Respondent Dr. Tubb will adopt by reference the Statement of the Case set forth in North Mississippi Medical Center's Brief in Opposition with the following highlights and additions.

Contrary to petitioner's statement they have never presented any information to substantiate any claim that the jury in this case was subjected to extraneous influence. After petitioners' counsel had twice violated a court order not to unilaterally contact jurors without first obtaining permission from the court, petitioners were presented with a hearing opportunity to make a showing that there was good cause to believe that the jury was subjected to extraneous influence prior to reaching its verdict. Following this hearing opportunity the trial court concluded that there was no cause to believe that any juror was subjected to extraneous influence and that there was no justification to subject any juror to

further interrogation. Contrary to petitioners' statement Dr. Gary did not substantiate that alternative juror Denham (erroneously referred to as "Denna") related to him (Gary) information indicating that the jury had received adverse information about plaintiff from outside sources prior to reaching its verdict. (Petition for Writ of Certiorari, p.2). Rather, Dr. Gary merely offered by way of affidavit that two (2) days after the jury had reached its verdict an alternate juror (who was excused prior to the jury retiring to deliberate its verdict) was then aware that Mrs. Nichols was receiving workers' compensation benefits. Dr. Gary's affidavit expressly disclaims any claim that Ms. Denham learned of information regarding workers' compensation while she was still serving as a juror and it in no way implies that any juror who deliberated and reached a verdict was subjected to any extraneous information. Moreover, petitioners wholly failed to mention that their counsel questioned another juror

(Chester Stasko) in violation of the court's order against contacting jurors. Petitioners' counsel secretly recorded his questioning of juror Stasko, and at the direction of the trial court a transcript of this recording was made and considered by the court in ruling on petitioners' motion to further interview jurors. Petitioners' counsel employed guile and cunning in an effort to induce juror Stasko to impeach his verdict, but Mr. Stasko remained resolute that the jury was not subjected to extraneous information before reaching its verdict, and that it was only after the jury had published its verdict and had been discharged did he learn that Mrs. Nichols was receiving workers' compensation benefits.

It is inaccurate for petitioners to imply that they ever presented the affidavit of discharged juror Clinton Hill to the trial court in support of their motion to interview jurors or motion for a new trial. The Hill affidavit was first presented in support of petitioners'

filing in the Mississippi Supreme Court which was treated as a Petition for Extraordinary Relief. Still the Hill affidavit discloses no source of outside information and is strictly confined to internal discussions among jurors.

It is further inaccurate for petitioners to claim that information concerning insurance benefits was foreign to the record. It was the petitioners themselves who interjected into the record before the jury the fact that Mrs. Nichols was receiving insurance benefits and that her medical expenses were "$7,000.00 per month".

It is also inaccurate for petitioners to claim support in the record that a settlement offer in any amount was made by any respondent.

Petitioners' statement of the case further fails to state that in neither their motion to interview jurors or for a new trial before the trial court, nor their direct appeal to the Mississippi Supreme Court, nor their separate filing in the Mississippi Supreme Court treated

as a Petition for Extraordinary Relief did they raise the federal constitutional claims now raised. Were petitioners to make the required candid statement required by Rule 14.1 (h), Rules of the Supreme Court of the United States as to when they first raised the federal question sought to be reviewed, it would be apparent that the claimed federal constitutional right to interview jurors under the first and fourteenth amendments was only first raised on petition for rehearing on direct appeal, after the matter of alleged improper influence on the jury was separately and finally concluded in a collateral appeal.

REASONS FOR DENYING THE WRIT

A. The Petition for Writ of Certiorari is untimely and the federal claims were not properly raised and preserved in the state courts below.

Respondent Dr. Tubb respectfully adopts by reference the argument made by respondent North

Mississippi Medical Center on these points.

B. The Petition for Writ of Certiorari is without merit.

The instant petition does not present any compelling reason for the allowance of a writ as outlined in Rule 10, Rules of the Supreme Court of the United States. The issue which the petitioners hold up for review is whether the constitutional guarantees of free speech and due process require that a litigant be allowed to interview jurors in furtherance of a motion for new trial. However, petitioners can not demonstrate that the proceeding which was followed in this case in any way conflicts with the decisions of any other court as to what is required by the United States Constitution under the circumstances. What the petitioners are reduced to arguing under the circumstances is the claim "that there is a diversity of opinion among the lower courts on the issue of (the) propriety of attorney contact with jurors post-verdict". (Petition p.6) Regardless of the

soundness of such claim, such does not amount to a conflict of authority as to what is constitutionally required. Furthermore, it can hardly be claimed that the proceedings followed in this case either conflicts with a decision of this Court or raises an important federal question which has not been settled by this Court. This Court's decisions in *Smith v. Phillips*, 455 US 209, 71 L Ed. 2d 78, 102 S.Ct. 940 (1982) and *Tanner v. United States* 483 US 107, 97 L Ed. 2d 90, 107 S.Ct. 2739 (1987) certainly do not require that a party be allowed to interview jurors any time there are unsubstantiated suppositions that a juror may have been subjected to extraneous information. Moreover, no decision of this court forecloses the requirement followed by the trial court in this case that a party must demonstrate a reasonable basis to believe that a juror was subjected to extraneous influence before permitting interrogation of jurors. Indeed, the decision in *Tanner* would clearly appear to

approve of such a supervisory procedure by a trial court. 483 US at 126, 97 L Ed. 2d at 109-110 (affidavit from juror submitted in support of new trial and obtained in violation of trial court's order and local rule against juror interviews would have been properly disregarded by court).

Contrary to petitioners' claim the proceedings followed by the trial court in this case are consistent with the procedures long recognized as necessary to protect the integrity of jury verdicts.

Mississippi law is in accordance with federal law in prohibiting jurors from being called as witnesses to testify concerning the internal discussions among the jury. *Salter v. Watkins*, 513 So2d 569, 571 n.1. (Miss. 1987) (Rule 606 (b), Mississippi Rules of Evidence modeled on Rule 606 (b) Federal Rule of Evidence, citing *Tanner supra)*; and Mississippi law has long recognized the policy concerns and necessity of zealously guarding against

subjecting jurors to post-verdict inquiry. *Pan American Petroleum Corp. v. Pate* 128 So 870 (Miss. 1930) (refusal to allow party to question juror even on subject of extraneous information where party can not first lay predicate of specific basis to believe such extraneous information was conveyed to jury) *Planters Wholesale Grocery v. Kincade* 50 So2d 57 (Miss. 1951) (allowing jury to impeach verdict would only encourage jury tampering).

Thus, Mississippi law is consistent with the general rule that post-verdict interrogation of jurors is not favored and should be closely controlled by the court. It is well to note here that the ability to question jurors was not absolutely foreclosed. The Court merely required that the petitioners make a specific showing of good cause to believe that extraneous influence reached the jury. The petitioners were provided with a hearing at which they had the opportunity to make such a showing of good cause. In the exercise of sound discretion the

trial court simply found that there was no evidence that the jury was subjected to extraneous influence, and thus, no justification to allow further interrogation of jurors. *O'Rear v. Fruehauf Corp.* 554 Fed. 1304, 1309-10 (5th Circuit 1976) (requiring a showing of "specific instances of misconduct" before allowing the parties to conduct juror interrogation); *Bolton v. Tesoro Petroleum Corp.* 871 F2d 1266 (5th cir.), *cert den* 493 US 823, 107 L Ed. 2d 49, 110 S. Ct. 83 (1989) (how best to gather information regarding alleged jury misconduct is a matter of trial court discretion); *Big John B.V. v. Indian Head Grain Co.* 718 F2d 143, 150 (5th Cir. 1983) (interrogation of jurors prohibited without preliminary showing of likelihood of specific instances of juror misconduct); *Continental Cas. Co. v. Howard* 775 F2d 876, 886 (7th cir. 1985) cert den. 475 US 1122, 90 L Ed. 2d 186, 106 S. Ct. 1641 (1985) (Same), *United States v. Gravely* 840 F2d 1156, 1159 (4th Cir. 1988) (Same); *United States v. Bruscino* 687 F2d 938, 941 (7th

Cir. 1902) cert den 459 US 1211, 75 L Ed. 2d 446, 103 S. Ct. 1205 (trial court can rely on its own familiarity with the proceedings when deciding whether a verdict was affected by outside influence.)

Here the petitioners' real complaint is the claim that they made a sufficient showing to justify being allowed to question other jurors. This merely amounts to a claim that the trial court abused its discretion in concluding otherwise. This is not the stuff of a constitutional claim.

CONCLUSION

Respondent Grayden Tubb, M.D. respectfully submits that the Petition for Writ of Certiorari should be denied. The federal claims presented for review by this court are untimely and were not properly raised and preserved in the state courts below. Moreover, the Petition is without substantive merit. The proceedings followed by the trial court in disposing of the petitioners'

motion to further interview jurors was in accordance with well recognized policy considerations and involved the exercise of discretion by the trial court. Neither the first nor the fourteenth amendments required the trial court to act other then it did.

Respectfully submitted

CARY E. BUFKIN, MSB #7036
D. COLLIER GRAHAM, MSB #4944
SHELL BUFORD BUFKIN
CALLICUTT & PERRY
920 TRUSTMARK BUILDING
P.O. BOX 157
JACKSON, MS 39205-0157
Counsel of Record